Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

BARTHOLOMEW J. LAWSON
and NANCY A. LESTER,

Petitioners,

v.

ROBERT ABRAMS, individually and as
New York State Attorney General, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

THOMAS JOSEPH CONE
Attorney for Petitioners
350 Fifth Avenue
Suite 5119
New York, New York 10118
(212) 643-2828

Dated: June 16, 1999

153339

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

136 pp

QUESTIONS PRESENTED

I. Whether there are any objective standards employed by the circuit courts of appeals to determine if a review by a district court judge of a magistrate judge's report and recommendation, prepared pursuant to 28 U.S.C. § 636(b)(1)(B)(C), to which objection was made, met de novo statutory and Constitutional standards.

II. Whether a circuit court has a duty to perform an "independent" or "plenary" review of a district court's decision which failed to address and correct clear errors of fact and law in a magistrate's report and recommendation, prepared pursuant to 28 U.S.C. § 636(b)(1)(B)(C), to which objection was made.

LIST OF PARTIES

Additional Respondents:

EDWARD KURIANSKY, individually and as New York State Deputy Attorney General for Medicaid Fraud Control, STEPHEN J. CALVACCA, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, JAMES SCARINGE, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, JOSEPH LOMBARDO, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, BARRY FRIEDMAN, individually and as an employee of the New York State Deputy Attorney General for Medicaid Fraud Control, EDWARD KAYE, individually and as an officer and employee of District 1199, the Estate of LEON DAVIS, individually and as an officer and employee of District 1199, DORIS TURNER, individually and as an officer and employee of District 1199, JUDITH BEREK, individually and as an employee of District 1199, PHILIP WITKOWER, individually and as an employee of District 1199, DIANE SAVAGE (also known as DIANE IANDOLI, also known as DIANE BIANCULI), individually and as an employee of District 1199, and EUGENE NACHAMKIN.

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Bartholomew J. Lawson and Nancy A. Lester respectfully petition for a writ of certiorari to review the Summary Order of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-6a) and of the district court (App., *infra*, 7a-12a) are unreported. The appendix also includes the report and recommendation of the magistrate judge (App., *infra*, 17a-97a), the order denying a rehearing by the circuit court (App., *infra*, 98a-99a), the judgment and the amended judgment of the district court (App., *infra*, 13a-14a; 15a-16a).

STATEMENT OF JURISDICTION

Petitioners seek a writ of certiorari to the Court of Appeals for the Second Circuit to obtain a review of the Summary Order of said court entered on December 23, 1998. Petitioners, pursuant to Fed. R. App. P. 40 and 35, on January 6, 1999, served and filed a brief for rehearing and a petition for rehearing en banc of the Summary Order. By order entered on March 19, 1999, Petitioners' request for a rehearing was denied. (App., *infra*, 98a-99a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section I of the Constitution of the United States provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, which shall not be diminished during their Continuance in Office.

In 1976 Congress amended section 28 U.S.C. § 636(b)(1) which is at issue in both of the questions presented. It now reads in applicable parts:

> (A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion . . . for summary judgment. . . .
>
> (B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), . . .
>
> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

STATEMENT OF THE CASE

In early 1981, Petitioner Lawson met with Respondent Davis, the president of District 1199 of the Hospital and Health Care Workers Union, in an effort to settle a labor dispute at Woodhull Nursing Home in Queens, New York. Petitioner Lawson was the Executive Director of the Greater New York Health Care Facilities Association, a nursing home trade association. At the meeting Respondent Davis threatened to destroy Lawson and drive him out of health care in New York. On January 28, 1981, Respondent Davis met with Respondent Attorney General Abrams in an effort to enlist his aid in removing Lawson from the nursing home industry. Respondent Abrams began an investigation of union charges leveled against Lawson.

In February 1981, one Aaron Elbogen was fired as the chief administrator of Woodhull. Elbogen, bitter at Lawson and blaming him for his recent firing, met Union Respondents Savage and Kaye and told them of information

he had received that Lawson paid one Meyer Bendet, a printer and community activist in Brooklyn, New York, to blow up a Union trailer parked near a nursing home operated by Petitioners in Brooklyn, New York, which had been beset by a violent strike conducted by District 1199. Petitioner Lawson acknowledges authorizing a $5000 payment to Bendet to provide community information about the strike but denies instructing him to blow up the trailer.

Respondent Savage then informed the Office of Special Prosecutor (OSP) of this new charge. OSP and Savage then engaged in a series of acts in order to try to convict Lawson of a crime. In answer to Interrogatories, Defendant Savage said she "was told that . . . [she] had been made an agent of the Office of the Deputy Attorney General for Medicaid Control. . . ." She said she "reported to [Respondent] Stephen Calvacca, [Respondent] James Scaringe and Paul Saqqal in addition to my union superiors." (C.A. Jt. App. A-1109; A-468, ¶¶11, 12).[1]

A bogus invoice documenting the $5000 payment was prepared by Bendet and OSP, following a taped phone conversation between Bendet and Lawson, and it was placed in the files of Lawson's Company by Bendet on June 1, 1981. A copy of an incomplete cost report contained in the files of Petitioners' nursing home was removed by one Israel Fogel and given to Union Respondent Savage, who gave it to State Respondent Scaringe on July 21, 1981. This meeting was authorized by the OSP lead prosecutor, Respondent Calvacca. In deposition testimony, Fogel gave conflicting statements as to how he obtained this document. Secret

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1. In this petition we will refer to the Joint Appendix filed with the court of appeals as "C. A. Jt. App."

grand jury matters were disclosed by State Respondent Scaringe to Union Respondent Savage; disclosures were made to the media resulting in a scathing article against Lawson when the grand jury was still meeting on the matter. Finally, State Respondent Lombardo, an accountant, without justification, testified to the grand jury that Lawson had filed a false Medicaid claim. Petitioner Lawson was indicted by a grand jury on April 23, 1982, and again on May 4, 1983. He was quickly acquitted at trial. One juror was quoted in the press as saying that Lawson had been "framed." (C.A. Jt. App. A-1154).

This case was filed on November 1, 1984, in the United States District Court, Eastern District of New York. Petitioners were then husband and wife and business associates. Petitioners charged, pursuant to 42 U.S.C. § 1983, a conspiracy by the Respondents to deprive Petitioners of their civil rights under the Constitution of the United States and for additional causes of action for torts under state law.[2] District Court Judge Carol B. Amon referred the summary judgment motions by the State and Union Respondents on March 18, 1994, to Magistrate Judge Roanne L. Mann for a report and recommendation.

On March 12, 1997, Magistrate Judge Mann issued a lengthy report and recommendation which ruled in favor of the State and Union Respondents and recommended that their motions for summary judgment be granted regarding the federal claim and further recommended either dismissing the state claims outright or declaring the court without jurisdiction over them. (App., *infra*, 17a-97a).

2. An earlier related decision by the Court of Appeals for the Second Circuit in this case is reported as *Lawson v. Abrams*, 863 F.2d 260 (2d Cir. 1988).

By Memorandum and Order of September 25, 1997, Judge Amon accepted the report and recommendation, with some corrections, and dismissed Petitioners' complaint in its entirety as to all the State and Union Respondents both as to the federal and state claims. Judge Amon corrected the magistrate's incorrect citation of 28 U.S.C. § 636(b)(1)(A) as the basis of jurisdiction, and replaced it with 28 U.S.C. § 636(b)(1)(B). The court made a minor change to the wiretap statute cited by the magistrate. 18 U.S.C. § 2511(2)(d). Judge Amon further suggested a more stringent test for malicious prosecution than stated in the Report; otherwise, she adopted the magistrate judge's reasoning and recommendations and concluded by saying, "Despite years of discovery . . . plaintiffs have been [sic] not been able to provide evidence sufficient to save their claims from summary judgment." (App., *infra,* 7a-12a).

On December 23, 1998, the court of appeals, in its Summary Order, rejected Petitioners' argument that Judge Amon failed to perform a proper *de novo* review. The court of appeals further rejected Petitioners' argument "that the magistrate judge and the district court resolved genuine issues of material fact in favor of defendants-appellees . . . [as being] without merit." (App., *infra*, 3a-5a). Next, the appellate court stated, relative to the events of July 21, 1981, "Even if the evidence had been removed without consent, this would not avail plaintiffs-appellants in any of their claims in this case. While that fact might support a claim under [sec.] 1983 for an unreasonable search, such a claim was not pleaded in the complaint."[3] (App., *infra*, 5a). Finally, the circuit court rejected Petitioners' argument "that

3. Petitioners deny this factual statement as described in the section titled, "III The Decision of The Court of Appeals is Erroneous."

the district court incorrectly decided the issues of conspiracy and lack of probable cause as a matter of law." (App., *infra*, 5a-6a).

REASONS FOR GRANTING THE WRIT

We will describe in this section the many conflicting United States appellate court decisions which have attempted to implement this Court's decision in *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424, (Blackmun, J., concurring, Powell, J., concurring in part and dissenting in part, Stewart, J., with Brennan, J., and Marshall, J., dissenting, Marshall, J., with Brennan, J., dissenting), *reh'g denied,* 448 U.S. 916, 101 S. Ct. 36, 65 L. Ed. 2d 1179 (1980). We will show that, as to both questions presented, there is substantial disagreement among the circuit courts of appeals concerning the implementation of *Raddatz* and, indeed, there are internal conflicts within the Tenth and Eleventh Circuit Courts of Appeal on these issues.

In 1980, a majority of this Court found that 28 U.S.C. § 636(b)(1)(B)(C) as revised to be Constitutional. Speaking for the majority Chief Justice Burger stated:

> The House Judiciary Committee added to the Senate bill the present language of the statute, providing that the judge shall make a "de novo determination" of contested portions of the magistrate's report upon objection by any party. According to the House Report, "[t]he amendment states expressly what the Senate implied: i.e. that the district judge in making the ultimate determination of the matter, would have

> to give fresh consideration to those issues to which specific objection has been made by a party."

447 U.S. at 675, 100 S. Ct. at 2412.

Justice Marshall, joined by Justice Brennan, in dissent, stated, "the Framers of the Constitution believed . . . that the judicial power of the United States would be placed in a body of judges insulated from majoritarian pressures. . . . In this case it is agreed that magistrates are not Art. III judges." *Raddatz*, 447 U.S. at 704, 100 S. Ct. at 2427.

The criteria used by a circuit court of appeals to review a district court's factual determinations, absent a referral to a magistrate pursuant to 28 U.S.C. § 636(b)(1)(B), is noncontroversial. Fed. R. Civ. P. 52(a) provides: "In all actions tried upon the facts without a jury . . . , [f]indings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, ..."

The circuit courts of appeals, however, have taken inconsistent positions on the applicability of Rule 52(a) when the district court refers matters to a magistrate for a report and recommendation under 636(b)(1)(B) and either adopts the magistrate's position or renders "a short, almost summary opinion. . . ." *Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984).

Circuit Judge Easterbrook in *United States v. Rodriguez*, 888 F.2d 519 (7th Cir. 1989) took an extremely deferential position concerning the role of a circuit court in evaluating whether a district court properly conducted a

de novo review of a magistrate's report and recommendations under 28 U.S.C. § 636(b)(1)(C). Judge Easterbrook acknowledged that:

> The argument for de novo appellate review is that the magistrate, not accorded the tenure and salary guarantees of Article III, cannot make binding decisions. An Article III judge must review de novo any contested findings of fact and proposed conclusions of law. . . . When the district judge abdicates to the magistrate, the argument runs, the appellate judges must supply the necessary de novo review. The Fifth Circuit adopted that view, United States v. Herbst, 641 F.2d 1161, 1167 (5th Cir. 1981), and the Eleventh Circuit took it over by inheritance, United States v. McKennon, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987). Without recognizing the conflict, we took the contrary position in United States v. Hardin, 710 F.2d 1231, 1235-36 (7th Cir. 1983). . . . Rodriguez wants us to abandon Hardin and adopt Herbst, but we think the approach of Hardin sound. . . .)

Rodriguez, 888 F.2d at 521.

In this petition we will address the two issues described by Judge Easterbrook, namely: (1) what constitutes a proper *de novo* review under its implementing statute and Article III of the United States Constitution; and (2) whether the circuit court is required by statutory and Constitutional principles to review the decision of the district court under the "independent" or "plenary" standard or the "clear error" standard. As he stated, Judge Easterbrook was aware of a

dispute between his Seventh Circuit and the Fifth and Eleventh Circuits.[4] The dispute is, however, broader than he described. We will cite cases in the Second, Third, Fourth, Sixth, Eighth and Tenth Circuits where conflicting positions have been taken on these issues. 888 F.2d at 521.

I.

THE MEANING OF *DE NOVO* REVIEW

A. Second, Seventh and Tenth Circuits

Perhaps the strongest statement of the deferential position taken by any circuit court of appeals on the issue of what constitutes a *de novo* review under 28 U.S.C. § 636(b)(1)(C) was that by the Tenth Circuit in *Andrews v. Deland*, 943 F.2d 1162, 1168-1170 (10th Cir. 1991), *cert. denied*, 502 U.S. 1110, 112 S. Ct. 1213, 117 L. Ed. 2d 451, *reh'g denied*, 503 U.S. 967, 112 S. Ct. 1580, 118 L. Ed. 2d 221 (1992). In this capital punishment case, the magistrate initially prepared an 89-page report and recommendation and subsequently a 68-page report and recommendation. The district court merely adopted the magistrate judge's report and recommendation. The circuit court of appeals reported that:

> Andrews argues that the brevity of the district court's orders adopting the magistrate judge's

4. The Eleventh Circuit Court which was separated from the Fifth Circuit in 1981 has adopted as precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc). *See also United States v. McKennon*, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987) (per curiam).

> two reports, the lack of a specific discussion in those orders of many of the issues or the record in this case, and the rapidity with which the district court reviewed and adopted the reports all indicate that the district court failed to conduct the kind of de novo review required by section 636(b)(1). We disagree.

The court of appeals concluded, "We will not look behind a district court's express statement that it engaged in a *de novo* review of the record." *Id.* at 1171.[5] *See also Clark v. Poulton*, 963 F.2d 1361, 1368 (10th Cir.), *cert. denied*, 506 U.S. 1014, 113 S. Ct. 635, 121 L. Ed. 2d 566 (1992).

As was stated by the circuit court of appeals in *Rodriguez*, the Seventh Circuit adopted the "deferential" position in *United States v. Hardin*, 710 F.2d 1231 (7th Cir.), *cert. denied*, 464 U.S. 918, 104 S. Ct. 286, 78 L. Ed. 2d 263 (1983). In *Hardin*, the court stated, "Thus, on appeal, the district court's decision to adopt the magistrate's credibility rulings without hearing the testimony can only be said to be abuse of discretion if the record reflects that those rulings were themselves clearly erroneous and entitled to no weight." 710 F.2d at 1235.

The Second Circuit Court of Appeals, from which this petition originates, has also taken a deferential position on this subject. In *Pan American World Airways, Inc., v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 894 F.2d 36, 40

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5. Andrews' death sentence was carried out on July 30, 1992. (Death Penalty Information Center, 1320 Eighteenth Street, N.W., Washington, D.C. 20036.)

n.3 (2d Cir. 1990) the court of appeals stated, "We find meritless Pan Am's procedural complaints. . . . Judge Glasser reviewed the record and the magistrate's recommendation and heard oral argument. That constituted adequate *de novo* review under 28 U.S.C. [sec.] 636(b)(1)." (citing *Raddatz*, 447 U.S. at 674-76, 100 S. Ct. at 2411-13.) *See also Murphy v. International Business Machines Corp.*, 23 F.3d 719, 722 (2d Cir.) (per curiam), *cert. denied*, 513 U.S. 876, 115 S. Ct. 204, 130 L. Ed. 2d 134 (1994). ("We do not construe the brevity of the order as an indication that the objections were not given due consideration, especially in light of the correctness of that report and the evident lack of merit in Murphy's objections.")

In the instant case, in a ruling similar to that in *Andrews*, *Rodriguez* and *Clark*, the Court of Appeals for the Second Circuit ruled that:

> Judge Amon's opinion expressly states that the district court, "having read the Report, plaintiffs' objections, defendants' replies, and having read and reviewed the record in this matter *de novo*, adopts the findings and recommendations in the Report and grants defendants' motion for summary judgment in its entirety." We have no reason to question that all this was done, and we decline to impose the requirement that a district court parrot each finding and recommendation that it chooses to adopt.

(App., *infra*, 4a).

B. Fourth, Fifth, Sixth, Eighth and Tenth Circuits

In contrast to the decisions in the Second, Seventh and Tenth Circuit Courts of Appeals the appellate courts for the Fourth, Fifth, Sixth, Eighth and even the Tenth Circuits Courts of Appeals have ruled that a failure of the district court to obtain and review a transcript or recording of testimony before the magistrate provides an objective standard for finding that a *de novo* review was not afforded to the objecting party. *Orpiano v. Johnson*, 687 F.2d 44, 48 (4th Cir. 1982); *United States v. Elsoffer*, 644 F.2d 357, 359 (5th Cir. 1981) (per curiam); *Hernandez v. Estelle*, 711 F.2d 619, 620 (5th Cir. 1983) (per curiam); *Cay v. Estelle*, 789 F.2d 318, 327 (5th Cir. 1986); *Hill v. Duriron Company, Inc.*, 656 F.2d 1208, 1215 (6th Cir. 1981); *Branch v. Martin*, 886 F.2d 1043, 1046 (8th Cir. 1989); *Taylor v. Farrier*, 910 F.2d 518, 519-20 (8th Cir. 1990); *Nabors v. United States*, 929 F.2d 354, 355 (8th Cir. 1990) (per curiam); *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987) (per curiam).

We note that the decision in *Gee v. Estes* preceded *Andrews v. Deland*, 943 F.2d 1162, (10th Cir. 1991). The court in *Andrews* distinguished its decision from that in *Gee* by quoting from the latter case, "We have also noted that 'an appellate court must be satisfied that a district judge has exercised his nondelegable authority by considering the actual testimony, and not merely by reviewing the magistrate's report and recommendations.' " *Andrews*, 943 F.2d at 1170; *Gee* 829 F.2d at 1008-09 (quoting *United States v. Elsoffer*, 644 F.2d at 359.[6]

6. Petitioners are not alleging that there was such a transcript or recording in the instant case. We note, moreover, that testimony of witnesses before a magistrate is not generally present in a summary judgment case. *See* Fed. R. Civ. P. 56(c). *But see Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1099 (6th Cir. 1984).

C. Fourth, Sixth and Eleventh Circuits

The failure to obtain and review a transcript or recording of testimony before the magistrate judge, however, is not the only objective standard by which circuit courts have found a failure by a district court to perform a *de novo* review. The appellate courts in the Fourth, Sixth and Eleventh Circuits have so ruled. The reasons given for such findings are: (1) failure to review "objections [which] specifically challenged the magistrate's proposed factual findings" was reversible error. *Orpiano v. Johnson*, 687 F.2d at 48; (2) "the district court failed to review all of the defendant's objections." *United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) (per curiam); (3) "[t]he district court, in a short, almost summary opinion, adopted the magistrate's findings and conclusion. . . ." *Equal Employment Opportunity Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1102 (6th Cir. 1984); and (4) failure to provide independent consideration of factual issues. *Lo Conte v. Dugger*, 847 F.2d 745, 750 (11th Cir.), *cert. denied*, 488 U.S. 958, 109 S. Ct. 397, 102 L. Ed. 2d 386 (1988). ("As the use of the phrase de novo implies, the district court's consideration of the factual issue must be independent and based upon the record before the court.")

Under the decisions in the Fourth, Sixth and Eleventh Circuit Courts of Appeals, we are confident that Judge Amon's brief Memorandum and Order would fail to meet their *de novo* standards. Judge Amon failed to completely review all of our objections, which was proscribed in *Orpiano,* 687 F.2d at 48 and *Shami,* 754 F.2d at 672; Judge Amon's Memorandum and Order was short and summary which was proscribed in *Keco Industries*, 748 F.2d at 1102; and Judge Amon's Memorandum and Order failed to provide independent consideration of factual issues which was proscribed in *Lo Conte*, 847 F.2d at 750.

II.

THE CIRCUIT COURTS OF APPEALS' STANDARDS OF REVIEW OF FINDINGS OF FACT AND MIXED QUESTIONS OF FACT AND OF LAW

Just as with the meaning of *de novo* review by the district court of a magistrate's report and recommendations, there are disputes among the Second, Third, Fifth, Sixth, Seventh, Eighth and Eleventh Circuit Courts of Appeals on the standard of review by the circuit courts of a district court's decision.

A. Second, Seventh, Eighth and Eleventh Circuit Courts of Appeals

Again, one side of the argument is well presented by Judge Easterbrook in *United States v. Rodriguez*, 888 F.2d 519, 521-22 (7th Cir. 1989). In *Rodriguez*, Judge Easterbrook stated:

> On occasion this court affirms a judgment on the basis of the district court's opinion. Affirming by adoption does not imply that we neglected our duties; it means, rather, that after independent review we came to the same conclusions as the district judge for the reasons that judge gave, rendering further explanation otiose. . . . We therefore reiterate the conclusion of Hardin that the standard of appellate review does not depend on whether a district judge adopted the magistrate's report or wrote a new opinion. The questions central to this case . . . depend on findings of fact that we review only for clear

> error; questions of characterization (was the consent "effective"?) also are fact-specific matters reviewed on a deferential standard.[7]

In *Jeffrey S. v. State Board of Education of State of Georgia*, 896 F.2d 507, 513 (11th Cir. 1990) (per curiam) the court ruled that "the clearly erroneous standard of review applies to a magistrate's findings of fact only on appeal." The Eighth Circuit Court of Appeals in *United States v. Turpin*, 707 F.2d 332, 334 (8th Cir.), *reh'g and reh'g en banc denied* (1983) applied the clearly erroneous standard to the mixed fact and law situation involving a voluntary confession because "the issue of consent is usually a factual one, a district court's finding of [voluntariness] must be accepted on appeal unless it is clearly erroneous." (citation omitted). *But see also United States v. Campbell*, 843 F.2d 1089, 1092 (8th Cir.), *reh'g and reh'g en banc denied* (1988) ("The findings with respect to the historical facts are reviewed under the clearly erroneous standard; the ultimate conclusion, however is subject to de novo review.") (citing *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5, 100 S. Ct. 1870, 1875-76 n.5, 64 L. Ed. 2d 497 (White, J. with

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7. The Seventh Circuit Court of Appeals in *United States v. D'Antoni*, 856 F.2d 975, 978 (7th Cir. 1988) defined the term "clearly erroneous." The definition is:

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. [citation omitted] Where there are two permissible views of evidence, the factfinder's choice between them cannot be clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 574, 105 S. Ct. 1504, 1511, 84 L. Ed. 2d 518 (1985).

Brennan, J., Marshall, J., dissenting and Stevens, J., dissenting), *reh'g denied*, 448 U.S. 908, 100 S. Ct. 3051, 65 L. Ed. 2d 1138 (1980).)[8]

As we stated *supra*, the Second Circuit Court of Appeals in *Murphy v. International Business Machines Corp.*, 23 F.3d 719 (2d Cir. 1994) (per curiam), fell well short of a plenary review of the district court's summary judgment decision.

Finally, in the instant case, the Court of Appeals for the Second Circuit approved the decision of the district court but never expressly defined what standard of review it employed. (App., *infra,* 1a-6a). It is clear, moreover, that the circuit court of appeals in the instant case failed to perform an "independent" or "plenary" review because of a number of errors it made concerning the Record in this case and its failure to address and correct the clear errors in the district court's opinion as further described in the section titled, "III The Decision of the Court of Appeals is Erroneous," *infra.*

B. Third, Fifth, Sixth and Eleventh Circuit Courts of Appeals

The Eleventh Circuit Court of Appeals, in an apparent conflict with its later decision in *Jeffrey S.*, took a conflicting position in *United States v. McKennon*, 814 F.2d 1539, 1543 n.6 (11th Cir. 1987) (per curiam). The circuit court of appeals

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8. This Court's decision in *Mendenhall* is frequently cited and extremely important to understanding the standards for a circuit court to follow in reviewing a district court's decision, but it did not involve a § 636(b)(1) referral to a magistrate.

initially acknowledged that, "[t]he first inquiry is a factual determination which is generally reviewed under a clearly erroneous standard." (citations omitted). However, in a footnote, the court clarified this comment by stating, "Binding precedent in this circuit suggests that when the district court merely adopts a magistrate's report and recommendation, reviewing courts are not bound by the clearly erroneous standard." (citations omitted). *See also United States v. Pulvano*, 629 F.2d 1151, 1156-57 n.7 (5th Cir. 1980) ("When, as in a case such as this, the District Court bases its ruling strictly on written evidence and stipulated facts, our review is not limited to the clearly erroneous standard."). In *Pulvano*, the court also noted the lack of clarity of the law on this subject as follows:

> We note that this Court and the Supreme Court have muddied the waters with regard to the proper standard of review. (citation omitted) In Mendenhall the Supreme Court vaguely indicates that clearly erroneous is the correct standard [citation omitted]. . . . Faced with such lack of clarity, we feel bound to follow this Court's most definitive statement that, when the District Court's voluntariness determination is based solely on transcripts and undisputed facts, we must make an independent review. (citation omitted)

See also Lo Conte v. Dugger, 847 F.2d 745, 750 (11th Cir. 1988). ("Thus, . . . all of the findings of fact reached by the district court . . . are subject to reversal on appeal only if clearly erroneous. . . . [But] mixed questions of fact and law . . . are, therefore, subject to independent review on appeal.") (citations omitted).

Finally, the Third and Sixth Circuits ruled, in § 636(b)(1)(B) cases involving a summary judgment, the review by a circuit court of appeals must be plenary. *Coolspring Stone Supply, Inc., v. American States Life Insurance Company*, 10 F.3d 144, 146 (3d Cir. 1993) and *Equal Employment Opportunities Commission v. Keco Industries, Inc.*, 748 F.2d 1097, 1101 (6th Cir. 1984). The Third Circuit Court of Appeals in *Coolspring* ruled, "Our standard of review on an appeal from a grant of summary judgment is plenary. [citation omitted] We review the facts in the light most favorable to the party against whom summary judgment was entered. *See White v. Westinghouse Elec. Co.*, 862 F.2d 56, 59 (3d Cir. 1988)." In *Keco Industries*, the court engaged in a plenary review and reversed the district court based on "erroneous," not "clearly erroneous," standard. 748 F.2d at 1101.

III.

THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

A. In evaluating whether Judge Amon gave "fresh consideration" to the issues raised in our Objections to Magistrate Mann's report and recommendation, the Court of Appeals for the Second Circuit found that it had no reason to question Judge Amon's statement that she performed a *de novo* review as discussed *supra* in Section I, "The Meaning of De Novo Review." (App., *infra,* 4a).

The circuit court, however, overlooked the key part of our argument which we made in our Brief for Petition for Rehearing En Banc. Both the magistrate judge and Judge Amon made obvious errors in at least three instances.

By failing to review and correct these errors, the circuit court has transformed 28 U.S.C. § 636(b)(1) from a protective device into a limiting standard which makes it possible to deny the losing party any meaningful review by a constitutional judicial officer. Parroting, as discussed by the court of appeals, is not the issue; clear, demonstrable errors are; and we received no review of these errors by Article III judges.

First, Judge Amon made only a minor correction to the magistrate judge's representation of the wiretap statute but failed to address the substantive difference between the cited 1986 statute and the 1968 statute which was in effect in 1981. (App., *infra*, 10a, n.1) 18 U.S.C. § 2511(2)(d); *See Meredith v. Gavin*, 446 F.2d 794, 799 (8th Cir. 1971); 114 Cong. Rec. 14694-14695 (May 23, 1968).[9] Second, Magistrate Judge Mann conceded that Israel Fogel's removal of the incomplete cost report from the nursing home, then controlled by the Petitioners, on July 21, 1981, would be a constitutional violation if Fogel conspired with OSP to illegally obtain the document. The magistrate judge, in error, then concluded there "was uncontradicted evidence" that Fogel legally obtained the document from an official of the nursing home. (App., *infra*, 64a). In our Objections, we brought to Judge Amon's attention the existence of contradictory evidence in the Record. (C.A. Jt. App. A-1365-66; A-127). Magistrate Mann quoted from page 110 of Fogel's deposition, but she failed to cite page 118 in which Fogel admitted that he took the cost report from the official's desk. Further, we informed the district

9. Respondent Savage made twelve tape recordings. (C.A. Jt. App. A-578-79). Savage made four such tape recordings at the request of, and with the assistance from, OSP. (App. *infra*, 24a, n.8).

court that, in the suppression hearing of October 17, 1983, Justice Bernstein of the New York Supreme Court found that Fogel did remove the papers from the nursing home. (C.A. Jt. App. A-1366). Nevertheless, Judge Amon failed to address this issue. Third, in discussing the submission of a false invoice for payment by the Department of Health, Magistrate Judge Mann ruled, "Lawson obviously was predisposed to submit a misleading invoice to DOH." (App., *infra*, 69a). The magistrate judge cited nothing in the Record to support such a predisposition yet she resolved the question against him. Judge Amon, without explanation, stated that the "Magistrate Judge . . . did not, as plaintiffs contend, resolve disputed facts against the plaintiffs." (App., *infra*, 11a).

B. The circuit court of appeals also made an error in evaluating the events of July 21, 1981. The appellate court said, "Even if the evidence had been removed without consent, this would not avail plaintiffs-appellants in any of their claims in this case. While that fact might support a claim under [sec.] 1983 for an unreasonable search, such a claim was not pleaded in the complaint." (App., *infra,* 5a). This is incorrect; it was pleaded in paragraph 78 of our Complaint as follows: "shortly thereafter, Fogel, Savage and the Deputy Attorney General's office agreed, that Fogel would steal a copy of the incomplete Institute cost report from plaintiff Lawson; on July 21, 1981, Fogel gave a copy of the purloined cost report to the Deputy Attorney General's office through Savage. . . ." (C.A. Jt. App. at A-65).

The circuit court, in discussing the submission of the false invoice for payment by the Department of Health, stated that, "plaintiffs-appellants again fail to demonstrate

that a genuine issue of material fact was resolved against them." (App., *infra,* 5a). No explanation for this statement was given by the circuit court, but the submission clearly is material because this invoice was the gravamen of two counts in the indictment against Petitioner Lawson. (C.A. Jt. App. A-378-79; A-1026-27).

C. Petitioners argue that the Summary Order is inconsistent with prior decisions of the Second Circuit Court of Appeals on the issues of conspiracy and probable cause. *Rounseville v. Zahl*, 13 F.3d 625 (2d Cir. 1994); *Marshall v. Sullivan*, 105 F.3d 47 (2d Cir. 1996). Of even greater importance, the Summary Order is in conflict with this Court's decisions in *Adickes v. S.H. Kress & Company*, 398 U.S. 144, 90 S. Ct. 1598, 26 L. Ed. 2d 142 (1970) (Black, J., concurring, Brennan, J., concurring in part and dissenting in part, Douglas, J., dissenting in part) and in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (Brennan, J., dissenting, Rehnquist, J., with Burger, C. J., dissenting). In *Adickes* this court ruled that the proof of a conspiracy under 42 U.S.C. § 1983 may rest on the "sequence of events" in the case and that the moving party at the summary judgment stage has "the burden of showing the absence of a genuine issue as to any material fact" relating to the conspiracy. This Court also noted that conspiracies are difficult to prove "especially given the fact that the noncircumstantial evidence . . . could only come from adverse witnesses." 398 U.S. at 157, 90 S. Ct. at 1608. *See also Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 2553, 91 L. Ed. 2d 265 (1986) (White, J., concurring, Brennan J., with Burger, C. J., and Blackmun, J., dissenting, Stevens, J., dissenting), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (1988), in which this Court, in a nonconspiratorial case, refined the meaning

of its holding in *Adickes*, but expressly ruled that its decision would be the same under the *Celotex* refinement "on the basis of the showing before the Court in Adickes. . . ." *Celotex*, 477 U.S. at 325, 106 S. Ct. at 2554.[10] Further, in *Anderson*, this Court ruled that "it is clear enough from our recent cases that at the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." 477 U.S. at 249, 106 S. Ct. at 2511. Nevertheless, in the Summary Order the court of appeals concluded, "It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights." (App., *infra*, 5a). This ruling is inconsistent with *Adickes* and *Celotex*.

Next, the court of appeals dismissed our argument regarding probable cause by stating, "After extensive

10. This Court held in *Celotex*,

> But we do not think the Adickes language quoted above should be construed to mean that the burden is on the party moving for summary judgment to produce evidence showing the absence of a genuine issue of material fact, even with respect to an issue on which the nonmoving party bears the burden of proof. Instead, . . . the burden on the moving party may be discharged by "showing" — that is, pointing out to the district court — that there is an absence of evidence to support the nonmoving party's case.

Celotex, 477 U.S. at 325, 106 S. Ct. at 2554. Petitioners argue that the "sequence of events" as described in the "Statement of the Case" meets the challenge in *Celotex* for the nonmoving party to show there is "evidence to support" its case. *Id.*

discovery, plaintiffs-appellants have failed to submit evidence sufficient to create a genuine factual issue as to whether this presumption could be overcome, and the matter was appropriately resolved at summary judgment." (App., *infra*, 6a). In *Marshall*, 105 F.3d at 52-53, however, this court of appeals stated:

> Of course, it is impossible for the Court, on a motion based merely on affidavits, to evaluate the truth of . . . testimony upon which the charge is based. Nor can we evaluate . . . testimony . . . as to what if anything took place during the private conversation. These remain disputed issues which must be tried by a jury.

Finally, the appellate court in *Rounseville* clarified the rule in this circuit on the issue of probable cause. The court stated:

> The New York Court of Appeals has recently explained in this exact context that: the issue of probable cause is a question of law to be decided by the court only when there is no dispute as to the facts or the proper inferences to be drawn from such facts. . . . Where there is "conflicting evidence, from which reasonable persons might draw different inferences . . . the question [is] for the jury."

Rounseville, 13 F.3d at 630; *Parkin v. Cornell University*, 78 N.Y. 2d 523, 529, 577 N.Y.S. 2d 227, 229-30, 583 N.E. 2d 939, 942 (1991).

We submitted such conflicting evidence; it was given by a certified public accountant, under oath, who completely refuted the state's evidence of probable cause. (A.C. Jt. App. at A-1026-40).

IV.

THE QUESTIONS ARE IMPORTANT

We petition this Court to grant a writ of certiorari to the Second Circuit Court of Appeals because as to both questions presented there are serious conflicts among numerous circuit courts of appeals. This matter is particularly important because the questions involve a possible violation of Article III, Section I of the Constitution of the United States.

The Petitioners allege that the decisions in the Second Circuit, and the other circuit courts of appeals, such as the Seventh Circuit, which, we believe, reached similar conclusions, are in conflict with the rationale of the majority of this Court in *United States v. Raddatz*, 447 U.S. 667, 100 S. Ct. 2406, 65 L. Ed. 2d 424 (1980), and underscore the concerns of the dissenting justices. We argue that the circuit courts of appeals, which fail to employ strict objective standards to challenge a district judge's assertions that he or she performed a *de novo* review of a magistrate's findings and recommendations or which fail to use a "plenary" or "independent" standard to review a district court's decision which is summary or contains errors, will not provide the rigorous oversight of the findings and recommendations of a magistrate judge that Congress and this Court in *Raddatz* required. We argue that this is what happened in our case, although as to several points of contention, clear error was also present.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS JOSEPH CONE
Attorney for Petitioners
350 Fifth Avenue
Suite 5119
New York, New York 10118
(212) 643-2828

Dated: June 16, 1999

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED AND FILED DECEMBER 23, 1998

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on this 23rd day of December, one thousand nine hundred and ninety-eight.

PRESENT:

Hon. Roger J. Miner,
Hon. John M. Walker, Jr.,
Hon. Robert D. Sack,

Circuit Judges.

Appendix A

No. 97-9352

BARTHOLOMEW J. LAWSON,
NANCY A. LESTER,

Plaintiffs-Appellants,

v.

WAYNE BARRETT, et al.,

Defendants,

ROBERT ABRAMS, et al.,

Defendants-Appellees.

* * *

Appeal from the United States District Court for the Eastern District of New York (Amon, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the appeal from said district court be and it hereby is AFFIRMED.

Plaintiffs-appellants appeal from the judgment and amended judgment of the district court entered December 4, 1997, and March 16, 1998, respectively. The district court granted summary judgment in favor of defendants-appellees by order dated September 25, 1997, on plaintiffs-appellants'

various claims under 18 U.S.C. § 1983 and state law for, *inter alia*, malicious prosecution and denial of due process.

The claims arise from a 1983 New York State prosecution of plaintiff-appellant Lawson on Medicaid fraud and other charges. Plaintiffs-appellants allege that members of District 1199 of the National Union of Hospital and Health Care Workers, the Office of the Special Prosecutor Medicaid Fraud Control, employees of the New York State Attorney General's Office, and others conspired to violate their federal rights by bringing false criminal charges against Lawson. The charges against Lawson included allegations that he paid his associate Mayer Bendet $5000 to blow up a Union trailer outside the nursing home Lawson operated and then attempted to receive Medicaid reimbursement for the $5000 payment.

Defendants-appellees moved for summary judgment on all counts, and Judge Amon referred the motion to Magistrate Judge Mann for a report and recommendation. Magistrate Judge Mann recommended granting the motion because "the acts complained of in this case do not . . . establish any violation under either section 1983 or the state law torts charged in the complaint." Plaintiffs-appellants filed timely objections to Magistrate Judge Mann's report; Judge Amon then issued an opinion accepting the report and recommendations and granting summary judgment for defendants-appellees. This appeal followed.

Plaintiffs-appellants first argue that Judge Amon failed to comply with 28 U.S.C. § 636(b)(1), which requires that a judge "make a de novo determination of those portions of

the [magistrate judge's] report or specified proposed findings or recommendations to which objection is made." However, Judge Amon's opinion expressly states that the district court, "having read the Report, plaintiffs' objections, defendants' replies, and having read and reviewed the record in this matter *de novo*, adopts the findings and recommendations in the Report and grants defendants' motion for summary judgment in its entirety." We have no reason to question that all this was done, and we decline to impose the requirement that a district court parrot each finding and recommendation that it chooses to adopt.

Their second contention is that the district court erred in applying precedents related to § 1983 claims based on substantive due process; plaintiffs-appellants insist that "there is not a word in our complaint which is based on substantive due process grounds." This argument is puzzling, given their complaint's first claim for relief alleging a deprivation of "rights to procedural and substantive due process." The contention, in any event, is also unavailing, because their § 1983 claim alleging malicious prosecution fails for inability to prove lack of probable cause.

Plaintiffs-appellants argue that the district court failed to apply the tests of qualified and absolute immunity properly. However, the magistrate's report specifically stated that regardless of whether (or which) immunity applied, the acts complained of did not amount to constitutional violations or state law torts. As we affirm on these grounds, we need not reach the question of what type of immunity applied to which actions by defendants-appellees.

Plaintiffs-appellants also argue that the magistrate judge and the district court resolved genuine issues of material fact in favor of defendants-appellees. This contention is without merit.

Plaintiffs-appellants identify two factual issues they claim were resolved against them: first, whether consent was given to remove evidence from their nursing home; and second, whether plaintiff-appellant Lawson ever submitted a misleading invoice to the Department of Health. While the question of consent to removal of the evidence may have been prematurely resolved, this issue of fact was not material. Even if the evidence had been removed without consent, this would not avail plaintiffs-appellants in any of their claims in this case. While that fact might support a claim under § 1983 for an unreasonable search, such a claim was not pleaded in the complaint. As for the question of Lawson's submission of the invoice, plaintiffs-appellants again fail to demonstrate that a genuine issue of material fact was revolved against them.

Finally, plaintiffs-appellants claim that the district court incorrectly decided the issues of conspiracy and lack of probable cause as a matter of law. We disagree. The district court correctly determined that only speculation and conjecture supported the conspiracy claim. "It is incumbent on a plaintiff to state more than conclusory allegations to avoid dismissal of a claim predicated on a conspiracy to deprive him of his constitutional rights." *Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990). In addition, a grand jury indictment created a presumption of probable cause that can only be overcome by "evidence that the indictment was

the product of fraud, perjury, the suppression of evidence . . . or other police conduct undertaken in bad faith." *Marshall v. Sullivan*, 105 F.3d 47, 54 (2d Cir. 1996). After extensive discovery, plaintiffs-appellants have failed to submit evidence sufficient to create a genuine factual issue as to whether this presumption could be overcome, and the matter was appropriately resolved at summary judgment.

We have considered all of plaintiffs-appellants' remaining arguments on appeal, and we find them to be similarly without merit.

For the reasons set forth above, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CAROLYN CLARK CAMPBELL, Clerk
By:

s/ Lucille Carr
Lucille Carr, Deputy Clerk

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED SEPTEMBER 25, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84-CV-4325 (CBA)

BARTHOLOMEW LAWSON and
NANCY A. LESTER,

Plaintiffs,

– against –

ROBERT ABRAMS, et al.,

Defendants.

AMON, United States District Judge:

MEMORANDUM & ORDER

Introduction

This is a § 1983 action brought by Bartholomew Lawson, a former nursing home operator, and Nancy Lester against several individuals currently or formerly in the New York State Attorney General's Office ("the State") and several past or present members and officers of District 1199 of the National Union of Hospital and Health Care Workers ("the Union"). Both groups of defendants have moved for

summary judgment pursuant to Fed. R. Civ. P. 56. By an order dated June 3, 1993, the Court referred the summary judgment motion pursuant to 28 U.S.C. § 636(b)(1)(B) to United States Magistrate Judge A. Simon Chrein for a Report and Recommendation ("Report"). The matter was transferred to Magistrate Judge Roanne L. Mann on March 18, 1994. On March 12, 1997, the Court received Magistrate Judge Mann's thorough and well-reasoned Report recommending that defendants' motion for summary judgment be granted in the entirety, or, in the alternative, that plaintiffs' first cause of action under 42 U.S.C. § 1983 be dismissed and that the Court decline to exercise supplemental jurisdiction over plaintiffs' remaining state law claims. Plaintiffs filed objections to the Report on June 9, 1997; both the State and Union defendants submitted responses to the objections on August 15, 1997; and plaintiffs submitted sur-replies to the responses on September 2, 1997. The Court, having read the Report, plaintiffs' objections, defendants' responses, and plaintiffs' replies, and having read and reviewed the record in this matter *de novo*, adopts the findings and recommendations in the Report and grants defendants' motion for summary judgment in its entirety.

Procedural History

Plaintiffs filed their original complaint in this matter on November 1, 1984, alleging violations of their civil rights by certain officers and employees of the Union and the State, as well as the publisher of the *Village Voice*, the New York State Department of Health, certain local politicians and a number of other defendants. On January 7, 1986, the

Appendix B

Honorable Henry Bramwell granted a motion to dismiss the action as to six defendants. On May 5, 1988, the Honorable Raymond J. Dearie granted a motion by plaintiffs to amend their complaint and, at the same time, dismissed the action as to nine other defendants. Judge Dearie noted that ". . . it is clear that the [state] defendants are immune from suit for their decision to prosecute Mr. Lawson as well as for other acts closely related to in the initiation of the charges . . . ," but the judge declined to dismiss certain other claims against the State defendants, which the judge concluded could, if proven, "go somewhat beyond purely prosecutorial undertaking and are therefore outside the range of prosecutorial immunity." (Order dated May 5, 1988 at 6.) The State defendants appealed this order and the Second Circuit dismissed the appeal for lack of appellate jurisdiction. *Lawson v. Abrams*, 863 F.2d 260 (2d. Cir. 1988). The defendants remaining in this action fall into two groups: State defendants and Union defendants. Each group has filed a separate motion for summary judgment on all of plaintiffs' state and federal claims.

Discussion

The Court has thoroughly reviewed plaintiffs' objections to the Report.

A. *The Facts*

The Court notes first that plaintiffs submitted a number of corrections, additions, comments, and clarifications to the facts as they are presented in the Report. The Court has fully considered these corrections in making its decision

and finds that, although as noted below several corrections are warranted, they make no difference to the Report's result or reasoning.[1]

B. *Malicious Prosecution*

The Court concurs with Magistrate Judge Mann's conclusion that plaintiffs' malicious prosecution claim under § 1983 should be dismissed because the State defendants are protected by absolute immunity; because plaintiffs have not shown personal involvement on the part of the Union defendants; and because plaintiffs have not made out the essential element of lack of probable cause. (Report at 14-27, 38-40.)

Moreover, the Court notes that the standard to establish a malicious prosecution claim is more stringent than suggested in the Report. In *Singer v. Fulton County Sheriff*, the Second Circuit held that a plaintiff may not bring a § 1983 malicious prosecution claim based on "substantive due process" grounds. *Singer v. Fulton County Sheriff*, 63 F.3d 110, 114 (2d Cir. 1995), citing *Albright v. Oliver*, 114 S.Ct. 807 (1994). Therefore, under federal law, a plaintiff

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1. The Court hereby adopts the following corrections to the Facts section of the Report as they are agreed to by all the parties: 1) On page 1, line 2 should read "§ 636(b)(1)(B)" not "§ 636(b)(1)(A)"; 2) on page 6, in footnote 8, second line, "1991" is replaced with "1981"; 3) On page 8, line 13 "one of plaintiff's employees" is replaced with "plaintiffs' administrative consultant"; and 4) On page 33, footnote 30, "wire, oral or electronic communication" is replaced with "wire or oral communication."

is "not entitled to judicial oversight or review of the decision to prosecute." *Singer* at 116.

The Second Circuit found that *Albright* does not bar a federal claim for malicious prosecution brought under the Fourth Amendment. *Id.* at 114. To properly assert such a claim, a plaintiff must allege "a deprivation of liberty consistent with the concept of seizure," and that the seizure occurred pursuant to the legal process. *Id.* at 116-117. The complaint is bare of any details of how Lawson was deprived of his liberty. Therefore, plaintiffs' claim also fails because they have not alleged how defendants' actions violated Lawson's Fourth Amendment right to be free from unreasonable search and seizure or provided an alternative basis for a malicious prosecution claim under § 1983. In any event, even if a Fourth Amendment violation could be divined from the numerous legal submissions in this case, or rectified by a repleading of the complaint, this claim fails for the additional reasons articulated in the Report.

C. *Summary Judgment Standard.*

Despite plaintiffs' claims to the contrary, the Court also finds that Magistrate Judge applied the appropriate summary judgment standard and did not, as plaintiffs contend, resolve disputed facts against the plaintiffs.

D. *State Law Claims*

The Court concludes that it is appropriate to exercise supplemental jurisdiction over the state law claims. For the reasons set forth in the Report, the Court further concludes

that defendants are entitled to summary judgment on plaintiffs' state law claims for malicious prosecution, abuse of process, intentional interference with contractual relations, interference with prospective advantage, and defamation.

Conclusion

In his 1988 opinion, Judge Dearie characterized the complaint in this matter as "short of specificity and long on characterization and innuendo" and indicated that he had little confidence that supporting evidence would be forthcoming. Despite years of discovery and exhaustive briefing by all the parties in this case, plaintiffs have been not been able to provide evidence sufficient to save their claims from summary judgment.

For the reasons set forth above and in the Report, defendants' motion for summary judgement is hereby GRANTED and the complaint is DISMISSED in its entirety.

SO ORDERED

Dated: Brooklyn, New York
September 25, 1997

s/ Carol Bagley Amon
Carol Bagley Amon
United States District Judge

APPENDIX C — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED DECEMBER 3, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84-CV-4325 (CBA)

BARTHOLOMEW LAWSON
and NANCY A. LESTER,

Plaintiffs,

– against –

ROBERT ABRAMS, et al.,

Defendants.

JUDGMENT

A memorandum and order of Honorable Carol Bagley Amon, United States District Judge, having been filed on September 30, 1997, and having conducted a *de novo* review of the record, adopting the March 12, 1997 Report and Recommendation of Magistrate Judge Roanne L. Mann granting defendants' motion for summary judgment and dismissing the complaint in its entirety, it is

ORDERED and ADJUDGED that plaintiffs take nothing of the defendants; that the March 12, 1997 Report

and Recommendation of Magistrate Judge Roanne L. Mann is adopted; that defendants' motion for summary judgment is granted; and, that the case is dismissed in its entirety.

Dated: Brooklyn, New York
December 3, 1997

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

APPENDIX D — AMENDED JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 13, 1998 AND FILED MARCH 16, 1998

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84-CV-4325 (CBA)

BARTHOLOMEH LAWSON
and NANCY A. LESTER,

Plaintiff,

– against –

ROBERT ABRAMS, et al.,

Defendants.

AMENDED JUDGMENT

A memorandum and order of Honorable Carol Bagley Amon, United States District Judge, having been filed on March 12, 1998, granting the plaintiffs' motion to alter or amend the judgment pursuant to F. R. Civ. P. 59(e) to include defendants Eugene Nachamkin and David Pollack in the dismissal of plaintiffs' case in its entirety, for the reasons set forth in the Court's September 25, 1997 Order; dismissing the action against David Pollack on the additional ground that plaintiffs failed to prosecute the action against him pursuant to F. R. Civ. P. 41 (b); it is

Appendix D

ORDERED and ADJUDGED that plaintiffs' motion to alter or amend the judgment of December 3, 1997 pursuant to F. R. Civ. P. 59(e) is granted; and, that an amended judgment is hereby entered dismissing the action against defendants, Eugene Nachamkin and David Pollack.

Dated: Brooklyn, New York
March 13, 1998

s/ Robert C. Heinemann
ROBERT C. HEINEMANN
Clerk of Court

APPENDIX E — REPORT AND RECOMMENDATION OF THE MAGISTRATE FOR THE EASTERN DISTRICT OF NEW YORK DATED MARCH 12, 1997

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

84-CV-4325 (CBA)

BARTHOLOMEW LAWSON, et al.,

Plaintiffs,

– against –

ROBERT ABRAMS, et al.,

Defendants.

REPORT AND RECOMMENDATION

ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:

Motions for summary judgment filed by the various defendants have been referred to the undersigned by the Honorable Carol B. Amon, pursuant to 28 U.S.C. § 636(b)(1)(A). For the reasons that follow, it is the recommendation of this Court that defendants' motions be granted and judgment entered in favor of defendants, dismissing plaintiffs' complaint.

Appendix E

PROCEDURAL BACKGROUND

Plaintiffs Bartholomew Lawson ("Lawson") and Nancy Lester ("Lester"), former spouses, filed their original complaint on November 1, 1984, alleging violations of their civil rights by certain officers and employees of District 1199 of the National Union of Hospital and Health Care Workers ("the Union"), the then New York State Attorney General, several Deputy State Attorneys General in the Office of the Special Prosecutor for Medicaid Fraud Control ("the OSP"), various employees of the New York State Department of Health ("DOH"), the publisher of the *Village Voice* and one of its reporters, and a law firm that represented the Union. According to plaintiffs, who had been ousted from their receivership position with a nursing home, the state prosecutors and other defendants had conspired to force plaintiffs' removal from the nursing home by instituting an allegedly fabricated criminal investigation and prosecution of Lawson.

By the end of May 1985, a number of defendants had filed motions to dismiss or for summary judgment. After the then presiding District Court judge dismissed the complaint on December 30, 1985, plaintiffs moved before the Honorable Raymond J. Dearie to amend their complaint on September 12, 1986. Judge Dearie reviewed the amended complaint for sufficiency and, on May 5, 1988, dismissed, *sua sponte*, plaintiffs' claims against several defendants.[1]

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1. In doing so, Judge Dearie noted that plaintiffs' amended complaint was "short of specificity and long on characterization and innuendo" and that "repeated readings of the complaint do not instill confidence that the supporting evidence will be forthcoming." (Memorandum and Order dated May 5, 1988 ["5/5/88 M&O"] at 1.)

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Remaining in the action are two groups of defendants, collectively and respectively referred to herein as "the State defendants" and "the Union defendants." Their names and titles during the relevant time period are as follows:

(1) The State defendants:

Robert Abrams, New York State Attorney General
Edward Kuriansky, Special Prosecutor, OSP
Steven Calvacca, Assistant Attorney General, OSP
Michael Berlowitz,[2] Assistant Attorney General, OSP
Barry Friedman, Chief Assistant Attorney General, OSP
James Scaringe, Special Investigator, OSP
Joseph Lombardo; Principal Auditor Investigator, OSP

(2) The Union defendants:

Leon Davis, President
Edward Kay, Vice President
Phil Witkower, Assistant to President Leon Davis

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2. Berlowitz, apparently the trial attorney in the Lawson prosecution, was not dismissed by Judge Dearie, yet he is never so much as mentioned by any of the parties in their submissions on the instant motion.

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Doris Turner, Executive Vice President of District 1199's Hospital Division
Judith Berek, Director of Legislative and Professional Programs
Diane Savage, a/k/a Diane Iandoli, Director of Research

According to plaintiffs' allegations, the State and Union defendants conspired to initiate a criminal investigation and prosecution of Lawson based on bogus accusations. (*See* 5/5/88 M&O at 4.) In his opinion of May 5, 1988, Judge Dearie summarized as follows the allegations underlying plaintiffs' federal cause of action under 42 U.S.C. § 1983: malicious prosecution, leaks of grand jury information to the media and various state agencies, illegal wiretaps, and fabrication of documentary evidence. (5/5/88 M&O at 4-5.) Of these allegations, Judge Dearie held that absolute immunity barred claims against the State defendants for malicious prosecution and subornation of perjury before the grand jury. (*Id.* at 5-6.) Judge Dearie indicated that the remaining claims against the State defendants were subject to a qualified immunity defense and thus depended on further development of facts for their resolution. (*Id.* at 5-7.) With "considerable reservation" (*id.* at 2), he therefore ordered that discovery take place and invited the parties to file dispositive motions, if appropriate, after completing discovery. (*Id.* at 11.)

The State defendants appealed Judge Dearie's order and, on December 20, 1988, the Second Circuit dismissed the appeal for lack of appellate jurisdiction. *Lawson v. Abrams*, 863 F.2d 260 (2d Cir. 1988).

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After extensive discovery, the State and Union defendants filed these motions for summary judgment. In addition to challenging the sufficiency of the proof with respect to plaintiffs' federal claim under section 1983, defendants also move for summary judgment on plaintiffs' five state law causes of action: for malicious prosecution, abuse of process, intentional interference with prospective advantage and with contractual relations, and defamation.

FACTUAL BACKGROUND

Plaintiffs and Joyce Burich were principals of a corporation called Lawson Life Extension Institute ("the Lawson Institute"), which in March 1980 was appointed receiver and interim operator of the Haym Solomon Nursing Home ("the Home") pursuant to a temporary receivership agreement between the Lawson Institute and the New York State Department of Health. (Compendium of Papers Submitted in Support of State Defendants' Motion for Summary Judgment ["State Ex."], Ex. 5.[3]) The appointment was for a 360-day period and gave DOH the sole discretion to terminate the receivership sooner in the event DOH obtained additional information relating to the receiver's character or competency. (*Id.* at ¶ 1.03.) The agreement contemplated that, after filing an "establishment application" and obtaining an operating certificate in its own

3. The parties' briefs and the First Amended Complaint ("Comp.") refer to plaintiffs' corporation as "Lawson-Burich Associates, Inc." (*See, e.g.*, Comp. at ¶ 44.) However, the receivership agreement (State Ex. 5) refers to the entity as "Lawson Life Extension Institute." The names were apparently used interchangeably. (*See*, e.g., State Ex. 53 at p. 1.)

name, the Lawson Institute would, if approved, become the owner of the Home at the end of the 360-day period. (*Id.* at ¶ 1.02.) The agreement also provided that if the Lawson Institute's establishment application were denied, it would be paid a receivership fee. (*Id.* at ¶ 4.08.)

The Lawson Investigation

In May 1980, after the Lawson Institute took over the operation of the Home, a labor dispute developed between the Home and the Union as a result of staff layoffs by the Home's new management. The State and Union defendants allege that on May 7, 1980, in an effort to quell these labor disputes, Lawson paid an associate, Mayer Bendet, $5,000 to blow up a trailer that housed the Union. *See* State Exs. 17, 21, 32, 82, 85-86; Union's Compendium of Exhibits ["Union Ex."], Exs. 8-10, 16-18; Plaintiffs' Compendium of Exhibits ["Pl. Ex."], Ex. 16.) Plaintiffs deny that any such plan was ever formulated (*see* Affidavit of Bartholomew Lawson dated September 30, 1993 ["Lawson Aff."] at ¶ 32, attached to Plaintiffs' Notice of Motion In Opposition to State Defendants' Motion For Summary Judgment), but admit that Bendet was given a check for $5,000, purportedly for "merely appearing at the Home [on May 7, 1980] and easing the tension" (Plaintiffs' Memorandum of Law In Support of Their Motion For an Order Denying the Union Defendants' Motion ["Pl. Br. #242"[4]] at 7-8 (citing Lawson Aff. at ¶¶ 35-37).) In any

4. This Court's use of the number "242" refers to the docket number of the referenced brief. Plaintiffs submitted four briefs in support of their motion for summary judgment: two initial briefs — one for each defendant — and two revised briefs in response to this Court's order that plaintiffs include citations to the record.

event, starting in early 1981, several of the Union defendants notified the New York State Attorney General's Office of the alleged bombing plot, as well as allegations that Lawson was participating in Medicaid fraud and patient abuse at several homes that he was operating, including Haym Solomon. (*See* State Exs. 7, 71; Pl. Exs. 5-8, 63, 77.) Shortly thereafter, the Attorney General's Office referred the complaints to the OSP. (*See* Pl. Exs. 7-11.)

The OSP then began an investigation of Lawson and of alleged misconduct involving the Lawson Institute and the Home ("the Lawson investigation"). (*See* State Exs. 13-19, 21-22, 31-32, 78; Pl. Exs. 16-17, 25-26; Union Exs. 12, 24.) Representatives of the OSP, including prosecutor Paul Saqqal[5] began meeting with various Union officials to obtain additional information, including the identities of and access to the Union's sources of information. (State Ex. 8.) In particular, the OSP enlisted the aid of one Union employee, Diane Savage ("Savage"), a/k/a Diane Iandoli. (State Exs. 13-16.)

On her own initiative, Savage taped a number of conversations between herself and plaintiffs' associates. (*See* Calvacca Aff. at ¶ 31A.) Lawson's voice is overheard

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5. Saqqal, who is not named as a defendant, was the prosecutor in charge of the Lawson investigation until he left the OSP in June 1981. Upon his departure, his responsibilities were assumed by defendant Stephen J. Calvacca. (Affidavit of Stephen J. Calvacca dated June 4, 1993 ["Calvacca Aff."] at ¶ 15, attached to State Defendants' Notice of Motion for Summary Judgment ["State Def. Notice"].)

on only one such taped call, in which he conversed with his then associate Israel Fogel. (Tape NYN 1596.[6]) Unbeknownst to Lawson, Savage was listening in and recording the conversation with Fogel's consent.[7] (*Id.*; State Exs. 38, 91 at pp. 218-19.)

Savage also made four tape recordings at the behest and with the assistance of the OSP.[8] According to the uncontradicted evidence, the remainder of the tapes (comprising about a dozen cassettes) were made by Savage independently and in direct contravention of the OSP's instructions to her regarding her investigation of Lawson. (*See* State Exs. 38, 41, 78, 90, 91; Pl. Exs. 24, 27, 53.)

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6. In response to an order of this Court, copies of 14 tape cassettes were provided to the Court in June 1995. The tape numbers utilized in this opinion correspond to the designations on the cassettes and in the OSP's investigative reports. In response to a further order of this Court, plaintiffs in 1996 furnished transcripts to the taped conversations.

7. One other tape contains Savage's conversation with Fogel, who then purportedly called Lawson on another line. Although Fogel is heard telling Savage that she "can listen in," Lawson's voice was not picked up on the recording, and it does not appear that Savage could understand Lawson's words. (Tape NYN 1589.)

8. To wit, a conversation on April 22, 1981 with Joseph Larry (Tape NYN 944; *see* State Ex. 15); a conversation on April 23, 1991 with Israel Fogel (Tape NYN 946; *see* State Ex. 16); a conversation on April 30, 1981 with Mayer Bendet (Tape NYN 956; *see* State Ex. 19); and a conversation on July 21, 1981 with Israel Fogel. (Tape NYN 995, NYC 1416; *see* State Ex. 31; Pl. Ex. 25.)

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Savage was also allegedly involved in leaking information regarding the Lawson investigation to the press and to and about the grand jury. These disclosures resulted in the publication in the *Village Voice* of an article written by Wayne Barrett, a former defendant in this action. (State Ex. 40; Pl. Exs. 9, 54.) Although the *Village Voice* article recounted information regarding the Lawson investigation, Barrett never attributed his information, even anonymously, to any of the State defendants.[9] In fact, Barrett specifically stated in the article that "the prosecutor . . . has never discussed any aspect of the case with me." (State Ex. 40 at p. 3; Pl. Ex. 9 at p. 3; *see also* Pl. Ex. 54.) Plaintiffs allege and defendants do not dispute that Savage gave the *Village Voice* article to the court reporter for the grand jury while the grand jury was in session. However, according to the uncontradicted affidavit of the court reporter, she never even read the article; instead, she folded it up and placed it out of the view of the grand jurors. (Pl. Ex. 72.)

Eventually, Savage placed the OSP in contact with Mayer Bendet. Through debriefings of Bendet and others (such as Fogel) who were present at the May 7, 1980 meeting with Lawson, the OSP confirmed that Lawson had paid Bendet $5,000 in return for either blowing up or otherwise removing the Union trailer, which was parked near the Home and was being used as Union headquarters for an ongoing strike by Union workers. (*See* State Exs. 21,

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9. Instead, the Barrett article describes its sources as "informants close to Lawson who are talking to Kuriansky, assistant attorney general Steve Calvacca, and chief investigator Jim Scaringe." (State Ex. 40 at p. 2; Pl. Ex. 9 at p. 2; *see also* Pl. Ex. 54.)

85; Union Exs. 8-10, 16-21; Pl. Exs. 16, 74 at p. 20.) Bendet also informed the OSP that he had received (but never responded to) a request from the Home for an invoice for $5,000 for services purportedly rendered. *See* State Exs. 20, 22, 82; Union Exs. 11-12; Pl. Exs. 15, 17.)

In response to this information, on May 22, 1981, prosecutor Saqqal arranged for Bendet to record a phone call to Lawson in which Bendet asked Lawson what information should be provided on the requested invoice. (Tape NYC 1340; *see also* State Exs. 25, 42, 82; Union Ex. 15; Pl. Ex. 21.) Lawson suggested that the invoice reflect that Bendet provided the Home with services as a "labor relations consultant." (Tape NYC 1340 [transcript at 1].) Under the supervision of prosecutor Saqqal, Bendet created an invoice with the phrase "community consulting" and then returned the invoice to the Home. (*See* State Exs. 25-26, 42 at p. 30; Union Ex. 14; Pl. Exs. 20-21.)

On July 21, 1981, the OSP, through Savage, was able to obtain from Fogel a cost report filed with DOH, in June or July of 1981, by the Lawson Institute on behalf of the Home. (*See* State Exs. 30-31, 88, 91, 93; Pl. Exs. 24-25, 31.) This cost report was reportedly submitted by the Home to determine the rate of Medicaid reimbursement that the Home would be receiving. (*See* State Ex. 48 at p. 6; Union Ex. 27 at p. 6.) In order to obtain this report, Savage contacted Fogel, who, as one of plaintiffs' employees, had access to the report. Fogel in turn requested a copy of the report from Joyce Burich, who gave it to Fogel without any inquiry. (*See* State Ex. 93 at pp. 109-10.) Fogel then provided this copy to Savage, who turned it over to

investigator Scaringe, who was part of the OSP team that prosecutor Calvacca was now heading. (Calvacca Aff. at ¶ 23; Pl. Ex. 25.)

Before filing charges against Lawson for Medicaid fraud, the State defendants needed to confirm that Lawson had included the $5,000 expense on the cost report. Accountants working for the OSP, including Joseph Lombardo, analyzed the cost report and other books and records from the Home and concluded that the Lawson Institute had included the $5,000 Bendet payment as a patient-related cost in the cost report.[10] (*See* Affidavit of Joseph Lombardo dated June 16, 1994 ["Lombardo Aff."] at ¶ 3, attached to State Def. Notice; Union Ex. 29 at p. 2.)

After reviewing the tapes, the invoice and the cost report, among other evidence, and hearing the testimony of various witnesses, the grand jury returned an indictment charging Lawson with conspiracy in the fourth degree to commit arson, falsifying business records, filing a false instrument, and criminal solicitation. (State Ex. 43.)

Upon Lawson's motion (State Ex. 47), the State Supreme Court, Kings County, dismissed the conspiracy and criminal solicitation counts for failure to properly charge the grand jury and failure to adequately inform the accused of the charges against him. (State Ex. 48; Union

10. In his criminal prosecution, Lawson disputed the State accountants' conclusion, claiming that before submitting the report, plaintiffs' accountants had deducted from the total reported expenditures an $80,000 "buffer," which included the $5,000 expense. (*See* State Ex. 47 at p. 22.)

Ex. 27.) The state court judge also ruled that the cost report was a "written instrument" within the meaning of New York's false filing law; that information proffered by Lawson as to the alleged incompleteness of the cost report was not exculpatory; that no collateral matters had been presented to the grand jury; and that there was no other basis for Lawson's allegations of prosecutorial misconduct. The court allowed the other counts to stand. (State Ex. 48; Union Ex. 27.)

In response to this decision, the State defendants chose to dismiss the entire indictment and resubmit the whole case to another grand jury to correct any real or perceived taint affecting the validity of the indictment. (*See* State Ex. 51 at p. 4; Union Ex. 29 at p. 4.) On May 4, 1983, the second grand jury returned an indictment charging Lawson with the same offenses contained in the original indictment. (State Ex. 50; Union Ex. 28.) Lawson moved to dismiss the new indictment on the same grounds put forth in his earlier motion. Relying on the doctrine of law of the case and after reviewing the merits of some of Lawson's arguments, the state court denied the motion in its entirety. (State Ex. 51; Union Ex. 29.)

Lawson was tried by a jury and acquitted of all charges on November 4, 1983. (*See* State Ex. 53 at ¶ 29.)

The Lawson Institute's Receivership and Establishment Application

In the meantime, as a result of the press coverage, other state agencies had become aware of the Lawson

investigation. (*See, e.g.*, State Ex. 69 at pp. 58-59; Pl. Ex. 35.) One such agency, the New York State Public Health Council ("PHC"), was responsible for reviewing the Lawson Institute's application for permanent establishment. On May 21, 1982, after receiving information from DOH that the Lawson Institute had violated its receivership agreement (which had been extended several times), PHC notified the Lawson Institute that PHC had decided to deny the Lawson Institute's establishment application. (Affidavit of Raymond D. Sweeney dated May 27, 1982 ["Sweeney Aff."] at ¶ 12, attached to State Ex. 45; Pl. Ex. 11.) PHC had information from DOH that the Lawson Institute had withdrawn from the Home more than $150,000 in receivership fees, in violation of its agreement not to withdraw such fees absent a final disapproval of the Lawson Institute's establishment application, and that it had furnished inadequate financial documentation. (Sweeney Aff. at ¶¶ 8-11; Pl. Ex. 10.) PHC found that the reported violation of the receivership agreement presented issues of character fitness that prevented the Lawson Institute's permanent establishment. (State Exs. 44-45; Pl. Ex. 11.[11])

Shortly thereafter, on May 26, 1982, DOH terminated the Lawson Institute's receivership pursuant to the clause in the receivership agreement that permitted termination in the event of receipt of new information reflecting on the receiver's character. (Sweeney Aff at ¶¶ 5-6, 14; Pl. Exs. 11, 60.) DOH's termination was based on the same

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11. At the urging of DOH, Lawson had withdrawn from the Lawson Institute prior to his first indictment. (*See* State Ex. 69 at pp. 61-64.)

information that had led to PHC's initial denial of the establishment application. (*See* Sweeney Aff. at ¶ 13; Pl. Exs. 11, 60.) Following a judicial hearing in response to an order to show cause dated May 27, 1982, DOH was appointed receiver of the Home. (*See* State Ex. 45; Pl. Ex. 10.)

The Lawson Institute appealed PHC's adverse decision on the establishment application and, on March 19, 1985, following an administrative hearing, an administrative law judge determined that PHC had incorrectly found a violation of the receivership agreement. The ALJ recommended that PHC reconsider the Lawson Institute's application in light of additional financial information that the judge directed the Lawson Institute to provide to PHC. (State Ex. 53 at pp. 28-29; Pl. Ex. 2 at pp. 28-29.) The Lawson Institute never provided this information and, according to plaintiffs, ultimately sold the Home without having received a permanent operating certificate. (Lawson Aff. at ¶ 81; Transcript of Oral Argument held on December 5, 1995 ["12/15/95 Tr."] at 84.)

DISCUSSION

I. General Legal Principles

Before addressing the specific allegations in the complaint and the legal elements of those claims, the Court will discuss several general principles that touch upon the entire complaint: *i.e.*, standing, collateral estoppel, and governmental immunity.

Appendix E

A. *Standing*

Plaintiffs' section 1983 claim alleges that defendants interfered with two broad categories of federal rights: various rights pertaining to the investigation and prosecution Lawson (the right to be free from false imprisonment, false arrest and malicious prosecution, and the right to a fair trial and judicial proceedings); as well as rights pertaining to plaintiffs' ownership interests in the Lawson Institute (the right to continue the operation of the Home and the right to due process in connection with the receivership proceedings). (Comp. at ¶¶ 128-29.) The state law claims likewise assert wrongs involving the criminal proceeding (malicious prosecution and abuse of process), on the one hand, and plaintiffs' alleged property interests, on the other (abuse of process, interference with prospective advantage and contractual relations, and defamation). (*Id.* at ¶¶ 133-46.)

An initial obstacle to various aspects of plaintiffs' claims is the doctrine of standing, which involves both the "rigorous actual case-or-controversy requirements" of Article III, and "judge-made, prudential limitations on the exercise by a federal court of judicial power." *In re Appointment of Independent Counsel (Schiavone)*, 766 F.2d 70, 74 (2d Cir.), *cert. denied*, 474 U.S. 1020 (1985) (collecting cases). The "requirement that a plaintiff show that he personally suffered actual or threatened injury as a result of defendant's conduct" "prevent[s] a litigant from resting his claim to relief on the legal rights of some third party. . . ." *Id.*

Measured against this legal principle, Lester may not be heard to complain of defendants' interference with any rights pertaining to the investigation or prosecution of Lawson. The law is clear that "a citizen lacks standing to contest the policies of the prosecuting authorities when he himself is neither prosecuted nor threatened with prosecution," as "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Id.* (quoting *Linda R.S. v. Richard D.*, 410 U.S. 614, 619, 93 S.Ct. 1146, 1149 (1973)). Consequently, to the extent Lester complains of violations of rights relating to the criminal investigation and trial, those allegations should be dismissed as to her.

With respect to plaintiffs' allegations of deprivation of their continued operation of the Lawson Institute, Lawson lacks standing to press these claims, as he relinquished his interest in the corporation prior to DOH's decision to terminate the receivership and PHC's initial decision to deny the establishment application. (*See* State Ex. 44 at 2; State Ex. 58.) Thus, even assuming *arguendo* that the individual shareholders of the Lawson Institute have standing to press these property claims,[12] Lawson was not a shareholder at

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12. This, too, is doubtful, as the receivership agreement and establishment application were executed on behalf of the corporation, not on behalf of any individuals. (*See* State Exs. 5, 44 at p. 2.) *See Sterngass v. Bowman*, 563 F. Supp. 456 (S.D.N.Y.), *aff'd*, 742 F.2d 1440 (2d Cir. 1983), *cert. denied*, 469 U.S. 823 (1984) (where interest belongs to corporation, right of corporation to sue under section 1983 eliminates standing of individual shareholders) (collecting cases).

the relevant times, and thus his allegations should be dismissed on this basis.

B. *Collateral Estoppel*

The State defendants assert the defense of collateral estoppel in response to several of plaintiffs' claims pertaining to the investigation and prosecution of Lawson. (*See* State Defendants' Memorandum of Law Submitted in Support of Their Motion For Summary Judgment ["State Def. Br."] at 18-19 & n.8, 26-27 & n.11.) "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81, 104 S.Ct. 892, 896 (1984). Under New York law, there are two essential requirements for invoking the doctrine of collateral estoppel: "[t]here must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action [and] there must have been a full and fair opportunity to contest the decision now said to be controlling." *Schwartz v. Public Admin. of Co. of Bronx*, 24 N.Y.2d 65, 71, 298 N.Y.S.2d 955, 960 (1969); *see also Johnson v. Watkins*, 101 F.3d 792, 794-95 (2d Cir. 1996); *Ryan v. New York Telephone Co.*, 62 N.Y.2d 494, 500-01, 478 N.Y.S.2d 823, 826-27 (1984).

In *Johnson*, the Second Circuit recently acknowledged the line of New York cases holding that "facts determined in a pretrial suppression hearing cannot be given preclusive effect against a defendant subsequently acquitted of the

charges[,]" inasmuch as the inability to appeal such a ruling prevents the accused from obtaining a "full and fair opportunity to contest" it. 101 F.3d at 795-96 (collecting New York cases). And while the caselaw does not define precisely the scope of this doctrine, the same rationale would seem to apply to all pretrial decisions, not just those relating to suppression of evidence. Accordingly, Lawson's acquittal on the criminal charges precludes application of collateral estoppel in this case.

C. *Governmental Immunity*[13]

The State defendants maintain that they are entitled to absolute immunity from liability for their challenged conduct in connection with the prosecution of Lawson.[14]

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13. The succeeding discussion of prosecutorial immunity applies with equal force to both the section 1983 claims and the state law claims, as New York caselaw mirrors that of the federal courts. *See, e.g., Claude H. v. County of Oneida*, 214 A.D.2d 964, 965, 626 N.Y.S.2d 933, 935 (4th Dept. 1995) (collecting cases); *Rosen & Bardunias v. County of Westchester*, 158 A.D.2d 679, 680, 552 N.Y.S.2d 134, 136 (2d Dept.), *cert. denied*, 498 U.S. 1086 (1990).

14. In their reply brief, the State defendants correctly conceded that absolute immunity does not apply to plaintiffs' allegations of property deprivation (State Defendants' Reply Memorandum of Law Submitted in Support of Their Motion For Summary Judgment ["State Def. Rep."] at 4 n. 1), and they similarly acknowledged at oral argument that a defense of only qualified immunity applies to the claim of illegal eavesdropping. (12/5/95 Tr. at 13.)

(Cont'd)

Appendix E

As an initial matter, the State defendants rely on Judge Dearie's prior decision in this case, in which he found it "clear that [the State] defendants are immune from suit for their decision to prosecute Mr. Lawson as well as for other acts closely related to the initiation of charges — such as the alleged subornation of perjury before the Grand Jury . . . ." (5/5/88 M&O at 6.) Judge Dearie's conclusion should be adopted as law of the case. *See Lasky v. American Broadcasting Co., Inc.*, 631 F. Supp. 962, 964 (S.D.N.Y. 1986) (citing *United States v. United States Smelting, Refining & Mining Co.*, 339 U.S. 186, 198, 70 S.Ct. 537, 544 (1950) ("[w]hen an issue is once litigated and decided, that should be an end of the matter.")); *Dictograph Products Co. v. Sonotone Corp.*, 230 F.2d 131, 135-36 (2d Cir.), *cert. dismissed*, 352 U.S. 883 (1956) (same).

In any event, Judge Dearie's ruling is a correct application of the doctrine of absolute immunity, the availability of which requires the court to conduct a "functional" analysis of the nature of the challenged acts. *See, e.g., Pinaud v. County of Suffolk*, 52 F.3d 1139, 1147 (2d Cir. 1995).[15] As the Second Circuit explained in

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(Cont'd)

The Union defendants do not assert an immunity defense; the law is clear that private persons alleged to have conspired with state officials may not invoke the immunity applicable to public officials. *See Wyatt v. Cole*, 504 U.S. 158, 112 S.Ct. 1827 (1992).

15. A court's evaluation of the issue of absolute immunity should precede its assessment of the sufficiency of a plaintiff's claim that his rights were violated. *See Pinaud*, 52 F.3d at 1148 n.4.

dismissing the State defendants' appeal from Judge Dearie's ruling:

> The availability of a defense of absolute prosecutorial immunity depends on the nature of the acts allegedly performed rather than on the office itself, for, as the district court observed, it is established that prosecutors have absolute immunity for some of their acts but only qualified immunity for others. *See, e.g., Robinson v. Via*, 821 F.2d 913, 918-20 (2d Cir. 1987); *Taylor v. Kavanagh*, 640 F.2d 450, 452 (2d Cir. 1981). With respect to the initiation of a prosecution and other actions "intimately associated with the judicial phase of the criminal process," the prosecutor enjoys absolute immunity. *Imbler v. Pachtman*, 424 U.S. 409, 430, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). On the other hand, no more than a qualified immunity is available with respect to acts of a prosecutor that are administrative or investigative in nature. *See Taylor v. Kavanagh*, 640 F.2d at 452-53; *Lee v. Willins*, 617 F.2d 320, 321-22 (2d Cir.), *cert. denied*, 449 U.S. 861, 101 S.Ct. 165, 66 L.Ed.2d 78 (1980); *see also Imbler v. Pachtman*, 424 U.S. at 431 n. 33, 96 S.Ct. at 995 n. 33 ("At some point, and with respect to some decisions, the prosecutor no doubt functions as an administrator rather than as an officer of the court. Drawing a proper line between these functions may present difficult

questions, but this case does not require us to anticipate them.").

Lawson v. Abrams, 863 F.2d at 262-63.

Applying this functional approach, the Second Circuit has consistently concluded that prosecutors enjoy absolute immunity from claims of malicious prosecution. *See, e.g., Pinaud*, 52 F.3d at 1149; *Hill v. City of New York*, 45 F.3d 653, 661 (2d Cir. 1995); *White v. Frank*, 855 F.2d 956, 962 (2d Cir. 1988); *Powers v. Coe*, 728 F.2d 97, 104 (2d Cir. 1990) ("the prosecutor's decision — malicious or not, with cause or without — to prosecute must be absolutely immune from civil suit.").[16] Moreover, because "a prosecutor must be permitted to work with a grand jury totally free of the threat of civil suit." *Powers*, 728 F.2d at 104, prosecutors likewise are absolutely immune from claims of subornation of perjury, including allegations of participation in a conspiracy to present false testimony to the grand jury. *See, e.g., Hill*, 45 F.3d at 661-62; *Dory v. Ryan*, 25 F.3d 81, 83 (2d Cir. 1994).[17] Consequently, as to the five prosecutor

16. Ignoring controlling caselaw, plaintiffs insist that "the State defendants are not absolutely immune for their actions in the malicious prosecution of plaintiff." (Plaintiffs' Memorandum of Law In Support of Their Motion For an Order Denying the State Defendants' Motion For Summary Judgment ["Pl. Br. #241"] at 18.) While plaintiffs assert that they "will establish that the State Defendants acted as investigators and administrators, rather than as advocates or prosecutors when they violated Plaintiff's civil rights" (*id.* at 20), their submissions to the Court contain little or no such analysis.

17. The Second Circuit's decision in *Hill* contains confusing language concerning the scope of immunity afforded a prosecutor (Cont'd)

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accused of conspiring to present false testimony to a grand jury. The Court began its discussion by noting that "[s]uch conduct on the prosecutor's part is clearly protected by the doctrine of absolute immunity"; 45 F.3d at 661; that "we, along with several sister circuits, have consistently stated that prosecutors are immune from § 1983 liability for their conduct before a grand jury"; *id.*; and that "[o]ur recent holding in *Dory v. Ryan*, 25 F.3d at 83, which established that absolute immunity extends even to conspiracies to present false evidence at trial, compels the same result in the grand jury setting." *Id.* at 662. The Court then appeared to qualify these absolute pronouncements by stating that "a prosecutor is immune from liability for out-of-court efforts to control a witness' grand jury testimony that are made *subsequent to a decision to indict.*" *Id.* (emphasis supplied).

Literally construed, the qualifying language quoted above would require the courts to become embroiled in analyses of prosecutors' subjective intent — contrary to a later passage in *Hill*, in which the Second Circuit observed that "the 'functional' test for absolute immunity is an objective one; it does not depend upon the state actor's subjective intent." *Id.* If any qualification is appropriate, then the test must be an objective one, suggested by a further passage in *Hill*, in which the Court looked to whether the allegedly improperly extracted statements were obtained before or after the prosecutor had probable cause to arrest the suspect. *See id.*; *see also Buckley v. Fitzsimmons*, 509 U.S. 259, 274, 275, 113 S.Ct. 2606, 2616 (1993).

Even assuming that a prosecutor is cloaked with only qualified immunity from accusations of a conspiracy to present false testimony against a suspect as to whom probable cause is lacking, plaintiffs have offered no evidence to establish that at or before the time of the grand jury presentation, the prosecutors were, or

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defendants — Abrams, Kuriansky, Berlowitz, Calvacca and Friedman — "the malicious prosecution claim, as well as all the claims relating to . . . the presentation to the grand jury, are covered by absolute immunity." *Pinaud*, 52 F.3d at 1149 (collecting cases).

Absolute immunity from the same allegations also protects the two remaining State defendants: James Scaringe, the Special Investigator for the Medicaid Fraud Control Unit, and Joseph Lombardo, Principal Auditor Investigator for the Medicaid Fraud Control Unit. Although not prosecutors, they functioned as agents of the OSP (*see, e.g.*, Calvacca Aff. at ¶¶ 1, 11, 26, 30), and thus "are entitled to the same degree of immunity as [the prosecutor defendants] for their activities while assisting with the investigation and prosecution of plaintiff." *Hill*, 45 F.3d at 660 (citing *Davis v. Grusemeyer*, 996 F.2d 617, 631-32 (3d Cir. 1993) ("Not only an attorney, but also the employee of an attorney, will be granted absolute immunity when the employee's function is closely allied to the judicial process.")); *see also Joseph v. Patterson*, 795 F.2d 549,

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should have been, aware of the alleged falsity of the testimony on which they sought to indict Lawson. On the contrary, the incriminating testimony and documents cross-corroborated one another. *See* p. 46 & n.43, *infra*. *See also San Filippo v. U.S. Trust of New York*, 737 F.2d 246, 256 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985) (concluding, on similar facts, that plaintiff's "completely unsubstantiated allegations of conspiracy [between prosecuting officials and complainants, to present false testimony and withhold exculpatory evidence] are insufficient to state a valid claim for relief under § 1983, or, in the alternative, to defeat defendants' motion for summary judgment.").

560 (6th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987) (official "functioning as the alter ego of the prosecutor" enjoys absolute immunity to the same extent as the prosecutor), *Doe v. Smith*, 704 F. Supp. 1177, 1185 (S.D.N.Y. 1988) ("A nonjudicial officer, such as an investigator for the district attorney's office, who undertakes ministerial actions intimately related to the judicial process at the express direction and control of the prosecutor, enjoys absolute immunity.").[18] In addition, Lombardo — who testified in the grand jury about his examination of the Lawson Institute's records and his conclusion that the cost report included the $5,000 payment to Bendet — is entitled to absolute immunity for his testimony as a witness. *See Dory*, 25 F.3d at 85 (citing *Briscoe v. LaHue*, 460 U.S. 325, 103 S.Ct. 1108 (1983)); *Daloia v. Rose*, 849 F.2d 74, 75-76 (2d Cir.), *cert. denied*, 488 U.S. 898 (1988).[19]

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18. Before adopting the "alter ego" doctrine in *Hill*, the Second Circuit held that prosecutors, in contrast to police officers and other witnesses, are cloaked with absolute immunity for extra-judicial conspiracies to present false testimony. *Dory*, 25 F.3d at 83-84, modifying *San Filippo*, 737 F.2d at 255. Presumably, police officers who function as agents of the prosecutor are, under *Hill*, entitled to the same immunity. In any event, at a minimum they clearly may invoke a defense of qualified immunity, which, under the facts of this case, entitles them to summary judgment.

19. In *White v. Frank*, 855 F.2d at 961, the Second Circuit carved out a narrow exception to the rule of witness immunity, holding that a police officer does not enjoy absolute immunity from malicious prosecution under section 1983 for his role as a "complaining witness." However, in *Sykes v. James*, 13 F.3d 515, 520 (2d Cir. 1993), *cert. denied*, 512 U.S. 1240 (1994), the Court

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Appendix E

Several allegations against the State defendants do not give rise to a defense of absolute immunity. For example, plaintiffs complain about improper disclosures of grand jury information to the media and illegal eavesdropping. In dismissing the State defendants' appeal in this case, the Second Circuit observed that *qualified* immunity applies to these claims:

> This Court, while recognizing that "neither *Imbler* nor *Kavanagh* purported to draw bright lines between quasi-judicial absolutely immune conduct, on the one hand, and investigative and administrative qualifiedly immune behavior, on the other," *Powers v. Coe*, 728 F.2d 97, 104 (2d Cir. 1984), has held that only the qualified immunity defense may be asserted against a claim that a prosecutor has disclosed information or evidence to the media, *id.* at 103; *see also Taylor v. Kavanagh*, 640 F.2d at 452, or against a claim that he authorized or directed an investigative wiretap, *Powers v. Coe*, 728 F.2d at 103. *See also Taylor v. Kavanagh*, 640 F.2d at 453 (stating obiter that investigatory and administrative work involved in "accumulating evidence" entitles prosecutor only to qualified immunity). We regard *Powers v. Coe* as reflecting the settled law of this circuit.

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of Appeals limited that exception to witnesses who "serve to institute [the] proceeding." Since Lombardo did not "institute" the investigation of Lawson, he is not a "complaining witness" within the meaning of *White* and thus is entitled to absolute immunity for his testimony in the grand jury.

Lawson v. Abrams, 863 F.2d at 263. Accordingly, with respect to plaintiffs' allegations of disclosure of grand jury information and illegal wiretaps, the State defendants may assert a defense of only qualified immunity, pursuant to which "a government official may claim immunity from suit only when in light of clearly established law and the information the official possesses, it was objectively reasonable for him to think that his actions were lawful." *Hill*, 45 F.3d at 663.

The only remaining allegations against the State defendants involve falsification of evidence, such as the Bendet invoice. In this context, functional analysis poses difficult line-drawing questions. In *Hill*, the Second Circuit held that absolute immunity "does not protect efforts to manufacture evidence that occur during the investigatory phase of a criminal case," *id.* at 662, and that therefore "a prosecutor [who] manufactures evidence for the purpose of obtaining probable cause to arrest a suspect, even when the evidence obtained is in a form suitable for later presentation to the grand jury," is cloaked with only qualified immunity. *Id.* at 663; *see generally Buckley v. Fitzsimmons*, 509 U.S. 259, 275 & n.5, 113 S.Ct. 2606, 2616-17 & n.5 (1993) (during the preliminary investigation of an unsolved crime, the fabrication of evidence in order to establish probable cause does not give rise to absolute immunity). Consequently, in determining whether the alleged fabrication of evidence occurred in the course of a defendant's role as an investigator as opposed to an advocate, timing is critical.

Unfortunately, the parties' submissions fail to clarify the role in which the State defendants were engaged when the evidence was allegedly fabricated. On the one hand, the record reflects that Lawson was already a target of the investigation and that the State defendants had ample probable cause to believe he was involved in a plot to bomb the Union trailer. *See* § II(F)(3), *infra*. Thus viewed, the record supports the State defendants' claim of absolute immunity. *See, e.g., Doe v. Smith*, 704 F. Supp. at 1185 (after a suspect had been identified, prosecutor's actions "were not to identify a suspect against whom to prepare a case, but to prepare the prosecution against a known defendant."). On the other hand, "[a]n official who asserts absolute immunity . . . shoulders the burden of establishing the existence of immunity for the function in question," *Hill*, 45 F.3d at 660, and "absolute immunity extends only so far as necessary to protect the judicial process." *Id.* (citing *Burns v. Reed*, 500 U.S. 478, 485-87, 111 S.Ct. 1934, 1938-40 (1991)).

The Court need not decide whether absolute or qualified immunity applies to plaintiffs' fabrication of evidence claims. Even assuming the unavailability of absolute immunity, the acts complained of in this case do not, as discussed below, establish any violation under either section 1983 or the state law torts charged in the complaint. *See generally Cook v. Sheldon*, 41 F.3d 73, 77 (2d Cir. 1994); *Sykes v. James*, 13 F.3d 515, 519 (2d Cir. 1993), *cert. denied*, 512 U.S. 1240 (1994).[20]

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20. The Second Circuit has instructed that before determining the viability of the officials' good faith defense, a court should (Cont'd)

Appendix E

II. *Plaintiffs' Section 1983 Claim*

In their first cause of action, plaintiffs allege that all of the defendants, acting in concert, wrongfully deprived plaintiffs of their right to continue the operation of the Lawson Institute; their right to be free from false arrest, false imprisonment, and malicious prosecution; their right to a fair trial and judicial proceedings; and their due process rights in connection with the receivership proceedings. (Comp. at ¶¶ 128-29.) Before turning to the legal sufficiency of plaintiffs' specific assertions of constitutional violations, the Court will address several issues relating to the sufficiency of the proof of the involvement of various defendants in the alleged plot to violate plaintiffs' rights.

A. *Personal Involvement*

The law is clear that "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977), *cert. denied*, 434 U.S. 1087 (1978), *quoted in Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994), and *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986). In other words, "a supervisory official cannot be held liable under § 1983 on a theory of respondeat superior." *Gan v. City of New York*, 996 F.2d 522, 536 (2d Cir. 1993) (citing *Monell v.*

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first consider whether the complaint sufficiently asserts a federal violation. *See, e.g., Blue v. Koren*, 72 F.3d 1075, 1080 (2d Cir. 1995) (citing *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793 (1991)); *Pinaud*, 52 F.3d at 1148 n.4.

Department of Social Services, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036 (1978)); *see Katz v. Morgenthau*, 709 F. Supp. 1219, 1229 (S.D.N.Y.), *aff'd in part, rev'd in part on other grounds*, 892 F.2d 20 (2d Cir. 1989) (same principle applies to public officials and private parties, as "no vicarious liability attaches to an employer by virtue of the existence of an employer-employee relationship with a tortfeasor.").

Even as narrowed by Judge Dearie, plaintiffs' blunderbuss complaint names a variety of defendants as to whom the evidence fails to establish the requisite level of personal involvement to support their liability under section 1983. Where, as here, a motion for summary judgment is supported by proof of facts that would entitle the movant to judgment as a matter of law, the opposing party, to defeat that motion, must "set forth specific facts showing that there is a genuine issue of material fact to be tried" and "may not rely simply on conclusory statements supporting the motion are not conclusory statements or on contentions that the affidavits supporting the motion are not credible." *Gan*, 996 F.2d at 532; *accord Williams v. Smith*, 781 F.2d at 328 ("mere conclusory allegations or denials will not suffice."). These principles raise insurmountable barriers to plaintiffs' federal claim against many of the defendants.

For example, plaintiffs have named as a defendant Assistant Attorney General Michael Berlowitz, who is not even referenced in the parties' submissions,[21] as well as the then State Attorney General, Robert Abrams. While it is undisputed that the Attorney General met with Union President Leon Davis and several other Union

21. *See* n.2, *supra*.

representatives on January 28, 1981 (*see* Pl. Ex. 5; State Def. Rep. at 26), plaintiffs cite no further action by Abrams, except possibly his referral of the Union's complaints about Lawson's activities to the OSP. (*See* Pl. Br. #241 at 55 (citing Pl. Ex. 7).)[22] Abrams has submitted an affidavit stating that he had no personal involvement in the Lawson investigation, did not know or have any dealings with either the OSP line attorneys handling the investigation or Diane Savage, and did not learn of Lawson's indictment until after the fact. (Affidavit of Robert Abrams dated June 8, 1993 at ¶¶ 4-6, attached to State Def. Notice; *see also* Affidavit of Edward J. Kuriansky dated June 21, 1993 ["Kuriansky Aff."] at ¶¶ 6-7, attached to State Def. Notice.)

Courts must "examine with great care" any suit charging that a prosecutor conspired with a witness or complainant and should "dismiss on pre-trial motion those that are clearly baseless." *San Filippo*, 737 F.2d at 256; *Katz*, 709 F. Supp. at 1231. Vague and conclusory allegations of conspiracy will not suffice; a plaintiff must

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22. Although former OSP prosecutor Saqqal speculated at his deposition that the OSP's interest in Lawson may have been fueled by pressure from representatives in the Attorney General's Office (Pl. Ex. 14 at pp. 115-16, 165-66), Saqqal's "purely subjective impression without any factual support amounts to nothing of legal significance and is insufficient to defeat a motion for summary judgment." *Carlson v. Arnot-Odgen Memorial Hospital*, 918 F.2d 411, 416 (3rd Cir. 1990); *accord May-Som Gulf, Inc. v. Chevron U.S.A., Inc.*, 869 F.2d 917, 925 (6th Cir. 1989); *see also Burlington Coat Factory Warehouse Corp. v. Esprit de Corp.*, 769 F.2d 919, 924 (2d Cir. 1985) (party may not rely on inadmissible evidence in opposing motion for summary judgment).

allege with particularity facts from which an improper agreement may be inferred. *See, e.g., Polur v. Raffe*, 912 F.2d 52, 56 (2d Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *Hughes v. Patrolmen's Benevolent Ass'n of the City of New York, Inc.*, 850 F.2d 876, 880 (2d Cir.), *cert. denied*, 488 U.S. 967 (1988); *Sommer v. Dixon*, 709 F.2d 173, 175 (2d Cir.), *cert. denied*, 464 U.S. 857 (1983); *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977)); *Powell v. Jarvis*, 460 F.2d 551, 553 (2d Cir. 1972); *Powell v. Workmen's Comp. Bd. of the State of New York*, 327 F.2d 131, 137 (2d Cir. 1964).

Abrams' single meeting with Davis does not create an inference of conspiracy. *See, e.g., Spear v. Town of West Hartford*, 954 F.2d 63, 68 (2d Cir.), *cert. denied*, 506 U.S. 819 (1992); *Mershon v. Beasley*, 994 F.2d 449, 452 (8th Cir. 1993), *cert. denied*, 510 U.S. 1111 (1994) ("multiple contacts" between complaining party and prosecutor did not "allow[ ] the inference" of a conspiracy). Nor does the record furnish any other basis on which to find Abrams' personal involvement in the challenged conduct — to wit, his "direct participation, or failure to remedy the alleged wrong after learning of it, or creation of a policy or custom under which unconstitutional practices occurred, or gross negligence in managing subordinates." *Black v. Coughlin*, 76 F.3d 72, 74 (2d Cir. 1996) (citing *Wright v. Smith*, 21 F.3d at 501).[23] As plaintiffs have cited no evidence to

23. Plaintiffs assert, without citation to the record, that Abrams entered into the alleged conspiracy "to pay back the huge political debt owed to Davis and [the Union] for their support during his past election campaign. . . ." (Pl. Br. #241 at 9.) Abrams

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controvert the representations in Abrams' affidavit, Abrams is entitled to summary judgment dismissing the claims against him for lack of personal involvement. *Gan*, 996 F.2d at 735.

Equally unsubstantiated are plaintiffs' allegations that the Union defendants other than Savage were personally involved in any of the alleged violations. With respect to Leon Davis, the President of the Union, the evidence establishes that he participated in two meetings with prosecutors concerning Lawson: the meeting with Abrams on January 28, 1981, and a meeting eleven months later, on December 23, 1981, with Special Prosecutor Edward Kuriansky, who advised Davis that he could not discuss the evidence with him. (Deposition of Edward Kuriansky ["Kuriansky Dep."] at 126-27, attached as Ex. J to Affidavit of Thomas A. Catalano In Reply to Plaintiffs' Opposition to the Union Defendants' Motion for Summary Judgment ["Catalano Aff."].) Plaintiffs' proof against the Vice President of the Union, defendant Edward Kay, is similarly thin: plaintiffs rely on the fact that Kay was present at the

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acknowledges that he received a $5,000 contribution from the Union on September 30, 1982, *after* the events complained of. (State Def. Rep. at 26 & n.19.) In any event, here, as in *Katz*, "no facts are alleged to support plaintiff's claim that [Abrams] directed and ordered the prosecution and the allegedly improper acts that occurred during the course of the prosecution." 709 F. Supp. at 1234 (granting summary judgment in favor of District Attorney Robert Morgenthau, notwithstanding his receipt of campaign funds from co-defendant Federation of Jewish Philanthropies and his status as a member of its Board).

January 1981 meeting with Abrams and was involved in the Union's hiring of Savage. (*See* Pl. Br. #242 at 47.) Regarding defendant Judith Berek, plaintiffs cite a number of communications between various prosecutors and Berek (*see* Pl. Br. #242 at 48), who, as the Union's Director of Legislative and Professional Programs, had frequent communications with government officials about a variety of issues touching upon the Union. (*See* Affidavit of Judith Berek dated May 14, 1993 at ¶ 2, attached to Union Defendants' Notice of Motion For Summary Judgment; Pl. Exs. 63, 65.) None of the aforesaid contacts with government officials can establish a conspiratorial meeting of the minds among these individuals.

With respect to Davis' Assistant, defendant Phil Witkower, plaintiffs assert that his involvement "included coercion of grand jury witnesses." (Pl. Br. #242 at 47.) Plaintiffs base this accusation on an alleged excerpt from a tape-recorded conversation between Savage, Fogel, and Aaron ("Ari") Elbogen (Tape NYN 1587), which, even assuming its admissibility against Davis, does not support plaintiffs' theory of coercion. *See* p. 44, *infra*. Finally, plaintiffs do not address in their papers the role of defendant Doris Turner in the alleged conspiracy.

In short, given plaintiff's conclusory allegations and the limited and innocuous conduct by Berlowitz, Abrams and the Union defendants other than Savage, "reasonable minds could not differ as to the import of the evidence before the court." *Cable Science Corp. v. Rochdale Village, Inc.*, 920 F.2d 147, 151 (2d Cir. 1990). Consequently, on this

basis, summary judgment should be granted in their favor on the section 1983 claim.

B. ***State Action***

In a related argument, the Union defendants challenge plaintiffs' section 1983 claim for lack of proof that they acted under color of state law. As the Second Circuit observed in *Spear v. Town of West Hartford*, 954 F.2d at 68:

> Section 1983 addresses only those injuries caused by state actors or those acting under color of state law. *Rendell-Baker v. Kohn*, 457 U.S. 830, 835, 102 S.Ct. 2764, 2768, 73 L.Ed.2d 418 (1982). A private defendant may be held liable only as "a willful participant in joint activity with the State or its agents." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152, 90 S.Ct. 1598, 1605-06, 26 L.Ed.2d 142 (1970) (quoting *United States v. Price*, 383 U.S. 787, 794, 86 S.Ct. 1152, 1157, 16 L.Ed.2d 267 (1966)).

Moreover, "[g]eneral allegations of cooperation between private defendants and specified State actors do not make out a claim of action under color of State law." *Bertucci v. Brown*, 663 F. Supp. 447, 454 (E.D.N.Y. 1987) (citing *Singer v. Bell*, 613 F. Supp. 198, 202 (S.D.N.Y. 1985)).

For the reasons stated in the preceding section, plaintiffs have proffered only "[c]onclusory allegations or naked assertions [which] are insufficient to plead joint or

conspiratorial action between a state actor and a private defendant," *Doe v. Smith*, 704 F. Supp. at 1188, and which cannot withstand a motion for summary judgment. *Katz*, 709 F. Supp. at 1231 (collecting cases). *See Spear*, 954 F.2d at 68; *Bailey v. Tricolla*, No. 94 Civ. 4597 (CPS), 1995 WL 548714 at *6 (E.D.N.Y. Sept. 12, 1995). The fact that the Union defendants reported Lawson's suspected criminal activity to the authorities did not convert their conduct into state action. *See Wright v. Montgomery Ward & Co.*, 814 F. Supp. 986, 992 (D. Kan. 1993), *aff'd mem.*, 25 F.3d 1059 (10th Cir. 1994) (department store was not "state actor" even though it reported criminal activity to police and interrogated suspect while police were called to the scene); *Newman v. Bloomingdale's*, 543 F. Supp. 1029, 1032 (S.D.N.Y. 1982) (no state action by store where police arrested alleged shoplifter based on oral complaint of store personnel who had detained suspect pending arrival of police). Nor did the Union defendants' attempts to keep apprised of the progress of the investigation evidence concerted action to deprive plaintiffs of their constitutional rights. *See Bertucci*, 663 F. Supp. at 454. In short, "[n]o evidence exists that the relationship between the [Union] defendants and the prosecuting attorneys was anything other than that of prosecutor and [complainant] . . . ." *Katz*, 709 F. Supp. at 1231; *see also Mershon*, 994 F.2d at 452 ("Any inference of a mutual understanding [between county prosecutor and complainant] could be the result only of 'mere conjecture and speculation' . . . ."); *Doe v. Smith*, 704 F. Supp. at 1189 ("If plaintiff has admissible evidence of joint action or a conspiracy, he cannot save it for trial.").

The only Union defendant who could in some respects be regarded as an agent of the State is Diane Savage, who

did perform certain investigative acts at the request and under the supervision of the OSP. Nevertheless, she cannot be deemed a state actor for all purposes. *See Ghandi v. Police Dept. of Detroit*, 823 F.2d 959, 963-64 (6th Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988) (rejecting "per se rule that the activities of paid government informants must always be considered government action" and noting that "[o]therwise, the courts will be in essence applying a sort of reverse respondeat superior doctrine.") Rather, this Court must examine the facts pertaining to the challenged activity to determine whether Savage's conduct is fairly attributable to the State. *Id.* at 963-64; *Doe v. Smith*, 704 F. Supp. at 1189; *see generally Spear*, 954 F.2d at 68. As noted in the succeeding sections, Savage's alleged violations were not committed under color of state law. Therefore, she and the other Union defendants are entitled to summary judgment on this basis.

C. *Disclosure of Grand Jury Information*

Turning now to the specific violations alleged by plaintiffs, one of their accusations is that, "in an attempt to influence the review of Lawson-Burich's application for the operating certificate" (Pl. Br. #241 at 73), defendants engaged in unlawful disclosure of grand jury proceedings, in violation of New York Penal Law § 215.70 and Criminal Procedure Law § 190.25.[24] (Pl. Br. #241 at 72.) Plaintiffs'

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24. Of course, to sustain a section 1983 violation, plaintiffs would have to show that the challenged disclosures violated their *federal* rights. *See, e.g., Cook v. Sheldon*, 41 F.3d at 77 (violation under state law "is not cognizable under section 1983 unless it also results in a violation of federal constitutional or statutory law.").

claim of disclosure of grand jury information is predicated on information obtained from the *Village Voice* article written by former defendant Wayne Barrett, in which Barrett describes Lawson's background and the ongoing investigation of him. (State Ex. 40; Pl. Ex. 9.) However, the OSP prosecutorial team has expressly denied responsibility for the disclosures (Calvacca Aff. at ¶ 31B; Affidavit of James Scaringe dated June 16, 1993 at ¶ 17, attached to State Def. Notice; Kuriansky Aff. at ¶ 23; Affidavit of Barry Friedman dated June 21, 1993 at ¶ 5, attached to State Def. Notice),[25] and the Barrett article specifically attributes its information to sources other than the State defendants, as indicated in the following excerpts:

> [F]ive individuals with various connections to Lawson and with detailed knowledge of his activities began talking to me about these allegations in my office and livingroom. . . . All have since gone to Kuriansky's office and some have kept me informed of their interactions with the *prosecutor, who has never discussed any aspect of the case with me.*
>
> In an interview with the *Voice*, Bendet . . . confirmed virtually every detail of the meeting at the institute [at which Lawson proposed that

25. Indeed, they reportedly attempted to convince Barrett not to publish the article. (Calvacca Aff. at ¶ 31B; Kuriansky Aff. at ¶ 22.) Kuriansky's agreement to pose for a photograph for the article (*see* State Ex. 95 at p. 4), while perhaps misguided, does not constitute an improper disclosure or establish a conspiracy to violate grand jury secrecy laws.

> Bendet arrange for the destruction of the trailer].
>
> [T]he *informants close to Lawson* are talking to Kuriansky, . . . have told me about a wide array of other Lawson activities.

(State Ex. 40 at pp. 2, 3; Pl. Ex. 9 at pp. 2, 3) (emphasis added).

Furthermore, although the Barrett article mentions that the allegations disclosed by its sources are under grand jury investigation, the article never provides any details of the grand jury investigation, the names of witnesses appearing before the grand jury, or the fact that an indictment would issue from the grand jury. While some of Barrett's sources were apparently grand jury witnesses,[26] who may have revealed the substance of their testimony before the grand jury, such disclosure does not violate the secrecy of the grand jury proceedings. *See* N.Y. Crim. Proc. Law § 215.70 (expressly permitting a grand jury witness to disclose the

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26. The Barrett article notes that a "grand jury began taking testimony from some of these witnesses," and it specifically refers to discussions with Bendet. (State Ex. 40 at p. 3; Pl. Ex. 9 at p. 3.) In addition, the article describes a female informant who "had tapes of a conversation with Lawson, Bendet and three other informants." (*Id.*) Savage, who fits this description, has acknowledged providing information to Barrett. (*See* Calvacca Aff. at ¶¶ 12, 31B; State Ex. 13.) Savage's actions cannot, however, be fairly attributed to the State defendants: prosecutor Calvacca warned her of the danger of the article's publication while the grand jury was still in session and asked her to try to persuade Barrett not to publish the article, while Saqqal similarly attempted to convince Barrett to refrain from publication. (Calvacca Aff. at ¶ 31B.)

substance of his or her testimony); N.Y. Penal Law § 190.25(4)(a) (same). Thus, Savage's disclosures to Barrett would not, without more, amount to misconduct.[27]

Faced with references in the Barrett article to sources other than the State defendants, plaintiffs suggest that the State defendants directed Barrett's informants to leak to the media information regarding the Lawson investigation.[28] However, plaintiffs have presented no evidence of State-directed leaks of grand jury information and thus have failed to establish the existence of a genuine issue of fact regarding this allegation. *See generally Delaware & Hudson Ry. v. Cons. Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990), *cert. denied*, 500 U.S. 928 (1991) (citing *Anderson v. Liberty Lobby*, 477 U.S. 242, 252, 106 S.Ct. 2505, 2512 (1986)).

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27. Savage is also alleged to have brought the Barrett article with her to the grand jury on April 22, 1982, and to have left it with the court reporter. (Calvacca Aff. at ¶ 31A.) Nevertheless, no proof was adduced that the grand jurors were privy to the article or its contents, which Calvacca expressly directed them to disregard. (*Id.*; *see also* Pl. Ex. 72.) Moreover, the indictment returned by that grand jury was voluntarily dismissed by the OSP and the case presented to a new grand jury, which indicted Lawson. (Calvacca Aff. at ¶ 33.) Consequently, as a matter of law, Lawson was not prejudiced by any improper dissemination of information to the first grand jury. *See, e.g., Jackson v. Dillon*, 518 F. Supp. 618, 622 (E.D.N.Y. 1981).

28. Plaintiffs offer no proof that any of the other Union defendants were involved in the disclosures to the press; they merely opine that "[t]he Union Defendants are liable because the disclosure was part of the conspiracy to 'bring Lawson down.' " (Pl. Br. #242 at 57.)

Moreover, Barrett's article, while detailing Lawson's activities, documents only the existence of the grand jury investigation and does not address specific exhibits, testimony, or other information concerning the grand jury investigation. The disclosure of facts and documents derived from independent investigation is permitted even if those same facts and documents are revealed in the course of a grand jury investigation. *See United States v. Liberman*, 687 F. Supp. 775, 776-77 (E.D.N.Y. 1988).

In any event, plaintiffs have offered no proof of any legally cognizable injury. Although Lawson implies that the disclosures to the press polluted his jury pool, "no denial of a fair trial can be shown where the plaintiff was acquitted of the crime charged." *Schiavone Constr. Co. v. Merola*, 678 F. Supp. 64, 66 (S.D.N.Y.), *aff'd mem.*, 848 F.2d 43 (2d Cir.), *cert. denied*, 488 U.S. 855 (1988). Nor does injury to reputation alone implicate any constitutionally protected rights or support a claim under section 1983. *Easton v. Sundrum*, 947 F.2d 1011, 1016 (2d Cir. 1991), *cert. denied*, 504 U.S. 911 (1992).

Finally, the suggestion that the Barrett article caused plaintiffs to lose their interests in the Home is simply too attenuated to make out a legally cognizable injury. Although plaintiffs complain that the OSP defendants sent information to DOH that was "detrimental" to Lawson — including newspaper clippings and confirmations of Lawson's indictment (*see* 12/5/95 Tr. at 59-61, 80-82) — they fail to identify any legally significant impropriety in connection with those communications. Notably, the evidence indicates that it was DOH that initiated contact with the OSP, and

that the prosecutors declined to provide information except "to the extent permitted by law." (Pl. Exs. 35, 58.) Furthermore, in order to recover for damages resulting from the dissemination of information to the media, plaintiffs must show not merely that defendants disclosed grand jury information for the purpose of prejudicing their application for an operating certificate, "but that the improper conduct in fact had that result," *Rosenberg v. Martin*, 478 F.2d 520, 525 (2d Cir.), *cert. denied*, 414 U.S. 872 (1973), and that "such deprivation was not 'too remote a consequence' of the improper leaks to the press.' " *Powers v. Coe*, 728 F.2d at 105.

Plaintiffs offer no evidence to establish that their failure to obtain approval of their establishment application was causally connected to any wrongdoing by defendants. PHC's first denial of the Lawson Institute's application on character grounds was reversed by a state administrative law judge and remanded to PHC for a review focusing only on further financial information to be supplied by plaintiffs. (State Ex. 53.) PHC complied with this directive but received no additional submissions from plaintiffs. (*See* State Exs. 55-67; 12/5/95 Tr. at 84.) Thus, the record conclusively establishes that it was plaintiffs' omission, and their subsequent decision to sell the Home to a third party (*see* 12/5/95 Tr. at 84), that resulted in their failure to obtain a permanent operating certificate.[29] In other words, plaintiffs

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29. At oral argument, plaintiffs for the first time suggested that they were unable to produce the requested information, as it had been turned over to an interim receiver pursuant to a state court

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offer no proof that the injuries resulting from either DOH's decision to terminate the Lawson Institute's receivership, or plaintiffs' failure to obtain approval of their establishment application, are in any way legally traceable to any acts on the part of the State or Union defendants. *See, e.g.*, *Williams v. Smith*, 781 F.2d at 324 (guard who files false report is not responsible for constitutional violations occurring at resulting prison disciplinary hearing) (citing *Sommer v. Dixon*, 709 F.2d at 174-75; *Jackson v. Dillon*, 518 F. Supp. at 622 (in view of intervening acts, improper confession was not the legal "cause" of a second trial at which confession was not introduced)); *cf. In re Schiavone*, 766 F.2d at 76 (plaintiff did not demonstrate that his injuries were traceable to government's failure to prosecute lying informant).

D. *Illegal Tape Recordings*

In support of their argument that certain tape recordings were illegally made, plaintiffs have provided this Court with copies of the disputed recordings and with transcripts. The Court has reviewed the recordings and transcripts in their entirety and finds that no genuine issue of fact has been presented regarding the legality of defendants' acquisition of these tapes. Tape recordings made either by or with the consent of a party to the conversation do not violate the non-consenting party's rights against illegal search and

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order. (12/5/95 Tr. at 84-85.) However, plaintiffs did not contend that they sought access to that documentation and/or that any of the State or Union defendants took steps to prevent such access.

seizure. 18 U.S.C. § 2511(2)(c), (d)[30]; *see also Lopez v. United States*, 373 U.S. 427, 439, 83 S.Ct. 1381, 1388 (1963).

Plaintiffs have interposed challenges to several recordings that they claim do not fall within the purview of section 2511(2)(c) or (d). However, as an initial matter, Lawson was a party to only two such conversations (State Ex. 4; Tapes NYN 1589, 1596, 1597),[31] and thus he may challenge only those recordings. *See, e.g., United States v. Lam*, 483 F.2d 1202, 1205 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974) (collecting cases); *United States v. Ragusa*, 586 F. Supp. 1256, 1258 (E.D.N.Y. 1984) (citing *United*

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30. 18 U.S.C. § 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

18 U.S.C. § 2511(2)(d) provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception. . . .

31. Lester was not a party to any of the recorded conversations.

States v. Fury, 554 F.2d 522 (2d Cir. 1977), *cert. denied*, 436 U.S. 931 (1978)).

Plaintiffs argue first that the recordings were made without the consent of at least one party to the conversations and thus fall outside the ambit of section 2511. (Pl. Br. #242 at 56.) Plaintiffs further contend that the State defendants are responsible for any resulting violations because they directed Savage to make these recordings on their behalf.

The Court's review of the tapes and transcripts in question has revealed that Savage obtained the requisite consent from at least one party to each conversation in which Lawson participated. In the first tape, NYN 1589, Savage telephoned Israel Fogel, who agreed to telephone Lawson, stating that Savage could "listen in." Lawson's voice cannot be heard on the remainder of the tape and it is not clear from the copies provided to the Court that Savage in fact ever recorded Lawson on that tape. However, even assuming that Lawson was taped by Savage during that conversation, the taping would not in any event have violated Lawson's rights: by allowing Savage to listen in, Fogel had effectively consented to any interception by Savage of Fogel's conversation with Lawson, including tape-recording. *See United States v. Tzakis*, 736 F.2d 867, 871-72 (2d Cir. 1984) (affirming trial court's ruling that defendant's consent to have interceptor "listen in" constituted implied consent to have his conversation tape-recorded).

The second tape-recorded conversation involving Lawson is contained on NYC 1596 and NYC 1597. The conversation commenced between Savage and Fogel and

later included Elbogen and eventually Lawson. Before Lawson joined the conversation, the three other parties are heard discussing the condition of their respective tape-recording devices. It is clear from this portion of the tape that all parties to the conversation other than Lawson had consented to the recording. More importantly, Fogel, the only party who identified himself to Lawson during his conversation with him,[32] consented to the tape-recording. This consent amply satisfied the requirements of section 2511(2) and *Lopez*, and defeats any argument that Lawson's rights were violated by the recording.[33]

Even assuming that Savage's actions did violate Lawson's rights, the remaining defendants should not be held liable under section 1983, as plaintiffs cite no proof of their involvement in Savage's recordings of Lawson. The fact that the OSP was supervising other activities undertaken by Savage did not make her an OSP agent for all purposes. *See Ghandi*, 823 F.2d at 961. Plaintiffs have adduced no

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32. Savage and Elbogen apparently listened to the conversation without Lawson's knowledge.

33. Though not charged in the complaint, plaintiffs argue in their briefs that the recordings were made in violation of Lawson's Sixth and Fourteenth Amendment rights to counsel. (Pl. Br. #241 at 70-71). However, "the Sixth Amendment right to counsel does not attach until adversarial proceedings have commenced." *Powers v. Coe*, 728 F.2d at 106. Therefore, even if Lawson "was a target of the grand jury and had retained counsel, the allegedly illegal wiretaps do not form the basis for an action under section 1983 asserting violations of his Sixth Amendment rights." *Powers*, 728 F.2d at 106.

evidence that the State defendants either supervised or otherwise directed these particular actions. "As a general rule, a government official is not liable for failing to prevent another from violating a person's constitutional rights, unless the official is charged with an affirmative duty to act." *Musso v. Hourigan*, 836 F.2d 736, 743 (2d Cir. 1988) (collecting cases); *see also Bailey v. Tricolla*, 1995 WL 548714 at *6. If anything, the evidence shows the State defendants' lack of contemporaneous knowledge of these tapes and their subsequent attempts to prevent further unauthorized action by Savage. Out of an abundance of caution, prosecutor Calvacca and investigator Scaringe admonished Savage in both a memorandum and a letter and retained possession of all the unauthorized tapes. (Calvacca Aff. at ¶ 31A; State Exs. 38, 41.)[34] Under these circumstances, no genuine issue of fact has been presented with respect to the personal involvement of any of the defendants other than Savage in the creation of the tapes.

E. *Fabrication and Theft of Documentary Evidence*

Plaintiffs contend that the State and Union defendants conspired together to fabricate a phony invoice and thus "invent evidence of nonexistent crimes . . . ." (*See* Pl. Br. #241 at 22.) Specifically, plaintiffs claim that Bendet's

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34. Plaintiffs' argument that the State defendants "received the benefits" of the recordings (Pl. Br. #241 at 36, 38, 40) misses the mark. Had they not taken custody of the tapes, plaintiffs might well be complaining of their failure to preserve allegedly exculpatory materials.

creation of the $5,000 invoice at the direction of the OSP amounted to improper behavior. However, the record reflects that the invoice was created in response to a request directed to Bendet, from the Lawson Institute, for "a copy of [the] original invoice." (*See* State Ex. 20; Union Ex. 11; Pl. Ex. 15.)[35] Although the OSP may have aided Bendet in the exact phrasing of the words used to complete the invoice, the OSP was guided by Lawson's instructions to Bendet during their tape-recorded telephone conversation on May 22, 1981:

Bendet:	Aw $5,000. [ ] check that I received. Invoices what and when. He wants to send them in, but what do I write?
Lawson:	Write, uh, Labor Relations Consultant.
	. . .
Bendet:	So give me something ere [sic] I give you advice on the [sic] that makes more sense than

35. Although plaintiffs allege that the invoice was created to provide evidence of "nonexistent crimes," the Lawson Institute's written request for an invoice specifically states that the "New York State Department of Health requires [the invoice] be available no later than May 31, 1981" (State Ex. 20; Union Ex. 11; Pl. Ex. 15), thus indicating that the Lawson Institute intended to submit such invoice for the purpose of obtaining Medicaid reimbursement.

labor relation. What do I know about labor?

Lawson: You let me know about the local community.

(State Ex. 23; Union Ex. 13.) After monitoring this conversation, prosecutor Saqqal and investigator Scaringe suggested that Bendet describe his services on the invoice as "community consulting" and return it to the Lawson Institute. (*See* State Exs. 22, 25; Union Ex. 12; Pl. Ex. 17.)[36] This phrasing, far from being defendants' creation, conformed completely to Lawson's tape-recorded characterization of Bendet's supposed services. Consequently, the record belies plaintiffs' assertion that Lawson "at no time instructed Bendet to create an invoice." (Pl. Br. #241 at 24.)

Plaintiffs next contend that "Fogel, at the specific direction of the OSP, through Savage, conducted an illegal search and seizure of Plaintiff's property." (Pl. Br. #241 at 30.) While this would indeed be a constitutional violation if proven, the uncontradicted evidence before this Court demonstrates that Fogel (an employee of the Home) legally obtained the document in question (a cost report) with the consent of a co-director of the Home (Joyce Burich), who relinquished it to him at his request. (*See* Deposition of Israel Fogel ["Fogel Dep."] at 110.) Thus, even assuming that any of the defendants had directed Fogel to obtain the

36. Curiously, plaintiffs do not name Saqqal as a defendant, although he was the prosecutor involved in the creation of the invoice. (*See* State Exs. 25, 42, 82; Union Ex. 15; Pl. Ex. 21.)

report, no constitutional violation occurred. *See generally Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041 (1973); *see also United States v. Matlock*, 415 U.S. 164, 171, 94 S.Ct. 988, 993 (1974) (consent by third party possessing authority over premises renders search constitutional).[37]

F. *Malicious Prosecution*

As part of their section 1983 claim, plaintiffs also allege that defendants engaged in malicious prosecution. Although section 1983 liability may be anchored in a claim for malicious prosecution, the federal court in such an action "borrow[s] the elements of the underlying malicious prosecution tort from state law." *Cook v. Sheldon*, 41 F.3d at 79 (citing *Raysor v. Port Auth. of New York and New Jersey*, 768 F.2d 34, 39 (2d Cir. 1985), *cert. denied*, 475 U.S. 1027 (1986)). The elements of malicious prosecution in New York State are (1) the commencement of a criminal proceeding against plaintiff, (2) termination of the proceeding in plaintiff's favor, (3) lack of probable cause to institute the proceeding, and (4) malicious intent in instituting the proceeding. *Cook*, 41 F.3d at 79; *Bernard v. United States*, 25 F.3d 98, 104 (2d Cir. 1994) (citing *Collum*

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37. Plaintiffs further complain that the document in question was in fact a "draft internal budget document [and not] a cost report capable of triggering [Medicaid] reimbursement . . . ." (Pl. Br. #241 at 26.) Suffice it to say, this state law argument was twice rejected in the course of Lawson's criminal prosecution, by two different judges who concluded that the reimbursement form was a legally sufficient basis upon which to sustain a charge of Medicaid fraud. (State Exs. 48, 51; Union Exs. 27, 29.)

v. Incorporated Village of Freeport, 691 F. Supp. 637, 640 (E.D.N.Y. 1988)); *Reid v. New York*, 736 F. Supp. 21, 24-25 (E.D.N.Y. 1990). Accordingly, the existence of probable cause will defeat such a claim, and "the fact that the Grand Jury returned an indictment . . . creates a presumption that [the accused's] arrest and indictment were procured with probable cause." *Bernard*, 25 F.3d at 104 (citing *Colon v. City of New York*, 60 N.Y.2d 78, 82, 468 N.Y.S.2d 453, 455, *rearg. denied*, 61 N.Y.2d 670, 472 N.Y.S.2d 1028 (1983)).[38] This presumption can be rebutted only upon a showing "that the indictment was produced by fraud, perjury, the suppression of evidence or other . . . bad faith." *Bernard*, 25 F.3d at 104 (citing *Colon*, 60 N.Y.2d at 78, 468 N.Y.S.2d at 456). However, "unsupported assertions simply do not suffice to make a triable issue in [the] face of [this] presumption." *Rose v. Bartle*, 692 F. Supp. 521, 531 (E.D. Pa. 1988), *aff'd in part, vacated in part on other*

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38. Although plaintiffs also assert false arrest and false imprisonment as bases for their section 1983 claim, *see Cook*, 41 F.3d at 77, those allegations likewise require a plaintiff to show that the arrest and imprisonment were not otherwise privileged. *See, e.g., Weyant v. Okst*, 101 F.3d 845, 852 (2d Cir. 1996); *Posr v. Doherty*, 944 F.2d 91, 96-97 (2d Cir. 1991.). "The existence of probable cause to arrest constitutes justification and is a complete defense . . . , whether that action is brought under state law or under § 1983." *Weyant*, 101 F.3d at 852 (citing *Bernard*, 25 F.3d at 102) (internal quotes omitted); *see also Singer v. Fulton County Sheriff*, 63 F.3d 110, 118 (2d Cir. 1995), *cert. denied*, __ U.S. __, 116 S.Ct. 1676 (1996); *Saghezi v. Reno*, No. 94 Civ. 8291, 1996 WL 524338 at *11 (S.D.N.Y. Sept. 16, 1996).

grounds, rev'd in part on other grounds, 871 F.2d 331 (3d Cir. 1989).[39]

In this case, *two* grand juries returned indictments charging Lawson with conspiracy to commit arson, falsifying business records, filing a false instrument, and criminal solicitation (State Exs. 43, 50; Union Ex. 28), thereby creating a presumption of probable cause as to both the arson plot and the Medicaid fraud. Faced with this presumption, plaintiffs allege numerous instances of purported misconduct that they posit led to the indictments against Lawson. However, as discussed below, these allegations are legally and/or factually insufficient to overcome the presumption of probable cause and defeat summary judgment.

1. ***Manufactured Jurisdiction***

Plaintiffs first contend that, in an effort "to find a way to get Lawson," the State and Union defendants conspired together to fabricate the Bendet invoice in order to create "a prosecutable crime within the OSPs jurisdiction." (*See* Pl. Dr. #241 at 23, 27.)[40] However, as the Second Circuit

39. Indeed, one court recently observed that it "[could not] find any case under § 1983 in which a court has found sufficient evidence was presented in opposition to a defense motion for summary judgment to rebut the strong presumption . . . so as to require a jury trial." *Scheiner v. Wallace*, No. 93 Civ. 0062 (RWS), 1996 WL 633418 at *7 (S.D.N.Y. Oct. 31, 1996).

40. Even if true, the "manufacturing" of a crime within the OSP's authority to prosecute would in no way undermine the (Cont'd)

recently reaffirmed, "manufactured jurisdiction as an independent doctrine is a dubious concept." *United States v. Wallace*, 85 F.3d 1063, 1065 (2d Cir. 1996) (collecting cases).

Wallace involved facts analogous to those in the present case: there, an FBI informant was recruited into Wallace's plan to cash stolen checks, and, upon Wallace's request for documentation that the informant had deposited a sum of cash, the government filled out a phony deposit slip with the consent of Citibank, a federally insured bank. In affirming the resulting conviction for bank fraud conspiracy, the Court of Appeals rejected Wallace's argument that the FBI's selection of a federally insured bank impermissibly "manufactured" federal jurisdiction.

The Court began by explaining that

> [t]he "manufactured jurisdiction" concept is properly understood not as an independent defense, but as a subset of three possible defense theories: (i) the defendant was entrapped into committing a federal crime, since he was not predisposed to commit the crime in the way necessary for the crime to qualify as a federal offense; (ii) the defendant's due process rights

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existence of probable cause concerning the arson plot. Plaintiffs cite no authority — and the Court is aware of none — to support plaintiffs' assumption that the prosecution of the accused by the "wrong" state prosecutor would, without more, provide the basis for a malicious prosecution claim.

> were violated because the government's actions in inducing the defendant to commit the federal crime were outrageous; or (iii) an element of the federal statute has not been proved, so federal courts have no jurisdiction over the crime.

85 F.3d at 1065-66 (citations omitted).

Here, as in *Wallace, id.* at 1066, plaintiffs do not and cannot assert an entrapment defense (*see* Pl. Br. #241 at 28-30; 12/5/95 Tr. at 50), as Lawson obviously was predisposed to submit a misleading invoice to DOH. *See generally United States v. Gantzer*, 810 F.2d 349 (2d Cir. 1987). As previously discussed, *see* pp. 36-37 & n.35, *supra*, the evidence shows that the invoice was created in response to a request directed to Bendet, from the Lawson Institute, for "a copy of [the] original invoice" (*see* State Ex. 20; Union Ex. 11; Pl. Ex. 15), and the notation on the invoice conformed to Lawson's tape-recorded suggestion. (*See* State Ex. 23; Union Ex. 13; Pl. Ex. 18.) The record thus lays to rest at least the first two theories of "manufactured" jurisdiction outlined in *Wallace*: entrapment and outrageous government conduct.[41]

Equally unavailing is any suggestion by plaintiffs that the probable cause analysis lacked an element of Medicaid fraud, thereby stripping the OSP of jurisdiction. In *Wallace*, the Second Circuit addressed a similar argument that the

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41. As the Second Circuit noted in summarily rejecting Wallace's due process claim of outrageousness, "the FBI committed no crimes here, acted with Citibank's cooperation, and lied to no one (except the conspirators)." 85 F.3d at 1066.

government had improperly provided the basis for federal jurisdiction. In rejecting Wallace's jurisdictional theory, the Court of Appeals concluded that when a government actor "introduces a federal element into a non-federal crime and [the accused] then takes voluntary actions that implicate the federal element, this Court has consistently held that federal jurisdiction has not been improperly 'manufactured' and that the statutory elements have been met . . . ." 85 F.3d at 1066 (citing, *inter alia*, *United States v. LaPorta*, 937 F.2d 58 (2d Cir.), *cert. denied*, 502 U.S. 950 (1991) (upholding conviction for destroying government property where informant asked defendant to destroy informant's "daughter's car," which was actually government-owned car); *United States v. Gambino*, 566 F.2d 414, 419 (2d Cir. 1977), *cert. denied*, 435 U.S. 952 (1978) (upholding Hobbs Act conviction where government created phony interstate garbage-collection business that defendant later threatened, as "[n]o one asked [defendant] to threaten the FBI agent or to hit him on the head")).

In the present case, it was the Lawson Institute that sought the invoice from Bendet and reportedly included the amount in its submission to DOH, and it was Lawson who initially proposed the misleading language on the invoice. Against this factual backdrop, and measured by the standards reaffirmed in *Wallace*, plaintiffs' "manufactured jurisdiction" claim must be rejected.

2. *Theft of the Cost Report*

Plaintiffs next seek to rebut the presumption of probable cause by citing the alleged theft of the cost report from the

Home. However, as previously detailed, the record reflects that Fogel lawfully obtained the document with the consent of a co-director of the Home. *See* pp. 37-38, *supra*.

3. *Coercion of Witnesses*

In yet another challenge to the grand juries' findings of probable cause, plaintiffs charge that the State and Union defendants conspired together to coerce the grand jury testimony of Eugene Nachamkin, Fogel, and Bendet. Specifically, they accuse Savage of waging a campaign of intimidation through "false representations and deceitful acts." (Pl. Dr. #241 at 33.) However, these allegations are likewise based on conjecture and outright distortions of the record evidence, and thus this Court is constrained to conclude that plaintiffs have not demonstrated the existence of a genuine issue of material fact sufficient to overcome the strong presumption of probable cause arising from Lawson's indictments.

a. *Nachamkin*

Plaintiffs assert that Savage "extorted a commitment from Nachamkin to testify falsely," threatened to ruin his future in the nursing home industry, and threatened to play incriminating tapes in order to insure that he would "keep faithful to 'the story' " about the bombing plot. (Pl. Br. #241 at 36-37.) However, plaintiffs' histrionic prose is based on two misleading references to tape transcripts and on unfair inferences. The first excerpt, inaccurately quoted from the transcript and without any mention of context, highlights Savage telling *Elbogen* that a "double-cross" by Nachamkin

would prompt her to "wreck him in the nursing home industry." (*Id.* at 36.) Standing alone, this hardly establishes coercion, as Savage's statements were not made to Nachamkin, and even if considered circumstantial evidence of Savage's motivation or state of mind, the absence of probable cause may not be inferred merely because one acted maliciously. *Jestic v. Long Island Savings Bank*, 81 A.D.2d 255, 258, 440 N.Y.S.2d 278, 280 (2d Dept. 1981); *Rounseville v. Zahl*, 819 F. Supp. 1148, 1163-64 (N.D.N.Y. 1993), *rev'd on other grounds*, 13 F.3d 625 (2d Cir. 1994); *see also Mozzochi v. Borden*, 959 F.2d. 1174, 1179 (2d Cir. 1992) (where probable cause exists, court will not consider motive of law enforcement personnel).

The other purported statement cited by plaintiffs is Savage's recounting to Elbogen: "Nachamkin doesn't believe that he is on tape. Tomorrow, I'm gonna have Phil (Witkower) play him part of the tape." (Pl. Br. #241 at 37.) However, plaintiffs' use of this quotation is even more disingenuous: the first sentence appears nowhere in any transcript in this case, and the second sentence is actually Savage's recollection to Elbogen about her conversation with *Bendet*. (Tape NYN 1587 [transcript at 15].) Moreover, a review of Tape NYN 1586, the conversation with Bendet to which this statement refers, reflects that Savage's "threat" to play a tape was merely a plea to keep Bendet from revealing to Lawson Savage's role in the investigation. (Tape NYN 1586 [transcript at 23-30].) Contrary to plaintiffs' misleading assertions, then, this statement is not

evidence of an attempt to coerce testimony at all, much less evidence regarding coercion of Nachamkin.[42]

Nevertheless, even if these alleged statements were made as plaintiffs contend, they do not rise to a level of coercion sufficient to defeat summary judgment in this case. In response to assertions of misconduct undermining a finding of probable cause, "courts have recognized a cause of action [only] where 'defendants deviated egregiously from accepted practices of investigation or otherwise engaged in conduct that shocks the conscience.' " *Dukes v. City of New York,* 879 F. Supp. 335, 342 (S.D.N.Y. 1995) (quoting *Simmons v. Chemung County Dept. of Social Serv.*, 770 F. Supp. 795, 801 (W.D.N.Y.), *aff'd*, 948 F.2d 1276 (2d Cir. 1991) (internal quotation omitted)). Fifth Amendment caselaw analyzing allegedly coerced confessions reveals that intentional trickery by an interrogator does not necessarily render a statement involuntary. *See United States v. Mitchell*, 966 F.2d 92, 100 (2d Cir. 1992); *United States v. Anderson*, 929 F.2d 96, 99 (2d Cir. 1991); *Green v. Scully*, 850 F.2d 894, 903-04 (2d Cir.), *cert. denied*, 488 U.S. 945 (1988). Rather, whether a statement is "a product of coercion may only be determined after a careful evaluation of the totality of all the surrounding circumstances, including the [witness'] characteristics, the conditions of interrogation, and the conduct of law enforcement officials." *Anderson*, 929 F.2d at 99 (citing, *inter alia*, *Schneckloth v. Bustamonte*, 412 U.S. at 226, 93

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42. Furthermore, even if this were construed as a threat against Bendet, it is a toothless one, as Bendet had already testified once in front of the grand jury three days *before* this conversation.

S.Ct. at 2047). Further, where, as here, the witness has a legitimate motive in making the statement, other evidence of coercive behavior does not render a statement involuntary. *Mitchell*, 966 F.2d at 100; *Scully*, 850 F.2d at 904.

In the instant case, the record reflects that Nachamkin and the other witnesses were relatively sophisticated and educated adults; the conditions of interrogation in no way approached the intimidating environment of a police station or a prolonged interrogation; and Savage's purported deception involved only bluffing about playing incriminating tapes. These circumstances hardly compare to the "chicanery" in *Scully*, where the Second Circuit refused to find coercion despite an officer's lies about having fingerprint evidence and a strong case against the accused. 850 F.2d at 903; *see also, e.g.*, *United States ex rel. Mancusi*, 310 F. Supp. 691, 712 (S.D.N.Y. 1970), *aff'd*, 441 F.2d 1073 (2d Cir.), *cert. denied*, 404 U.S. 849 (1971) (alleged threat to tell police about defendant's criminal activity insufficient to show coercion where petitioner was educated and under no restraint, and where no threats of violence were involved). Thus, Savage's conduct can in no way be said to "shock the conscience" so as to rebut the presumption of probable cause. *Dukes*, 879 F. Supp. at 342.

Furthermore, in 1990, long after Lawson's criminal prosecution had exposed Nachamkin's involvement and dissipated any possible fear of retribution, Nachamkin personally reviewed and confirmed the truthfulness of his grand jury testimony. (Deposition of Eugene Nachamkin at 49, attached as Ex. D to Catalano Aff.) Finally, other

evidence before the grand jury — including testimony of Elbogen and Chaim Stern, as to whom plaintiffs make no allegations of coercion — corroborated the version of the facts described by Nachamkin.[43] In light of all of these factors, this Court concludes that plaintiffs have not provided sufficient evidence of coercion of Nachamkin to undermine the presumption of probable cause.

b. *Fogel*

Plaintiffs similarly allege that Savage threatened Fogel to get him to "stick to the story of the bombing," warning of the danger of "double-crossing" her. (Pl. Br. #241 at 38.) Only one feature of this claim distinguishes it from the baseless one regarding Nachamkin, as plaintiffs state that "Fogel recanted his entire grand jury and trial testimony. (*Id.* at 39.)

As an initial matter, "[c]ourts characteristically treat witness recantations 'with the utmost suspicion.' " *Russell v. Smith*, 68 F.3d 33, 36 (2d Cir. 1995) (quoting *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987)); *see also Buckley v. County of Dupage*, No. 88 C 1939, 1996 WL 386552 at *5 (N.D. Ill. July 2, 1996) (probable cause not

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43. Elbogen testified that at Lawson's instruction, Elbogen telephoned Bendet to ask why nothing had been done to the trailer, and that he and Lawson drove past the trailer several times to see if it was occupied. (Union Ex. 19 at pp. 39-40.) According to Stern, Lawson uttered "good-bye trailer" and proposed "tak[ing] a look at the trailer once more before it blows up." (Union Ex. 21 at pp. 53, 56.)

necessarily undermined by recantation of witness). As noted in the discussion regarding Nachamkin, there was significant other evidence before the grand jury, whose members were free to make their own decisions about the weight to be accorded Fogel's testimony.

More importantly, however, Fogel's deposition testimony, given pursuant to a release from all liability to plaintiffs in exchange for his cooperation (Fogel Dep. at 35, 40-43; *see* Ex. F to Catalano Aff.), is far from a "recantation" of his grand jury testimony. At his 1991 deposition, Fogel repeatedly recalled that bombing the trailer was discussed in the meeting with Lawson on May 7, 1980. (*See* Fogel Dep. at 11-12, 14-16, 20-21, 49.) Indeed, the only relevant difference in his recollection during his deposition was that he recently had come to believe that Lawson was not serious about having Bendet firebomb the trailer. (*See id.* at 16, 38-39, 49-50.)[44] This subjective opinion, developed with as many as 11 years of hindsight,[45] in no way validates plaintiffs' allegations of coercion by

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44. Although plaintiffs assert that during a consensually recorded conversation on July 21, 1981, Fogel was overheard "again stat[ing] that there was never any plan to blow up the trailer" (Pl. Br. #241 at 31), the evidence cited in support of that claim flatly belies plaintiffs' contention. No such statement by Fogel is contained therein, and, in fact, the conversation appears to confirm that this option was discussed. (Tape NYN 1416A, side B [transcript at 5-6, 11-12].)

45. Fogel testified at his deposition that he came to hold this opinion immediately preceding the deposition upon listening to the tape-recorded telephone conversations. (Fogel Dep. at 50.)

Savage, nor does it undermine the grand juries' determinations of probable cause. In fact, Fogel confirmed that, at the time he testified before the grand jury, he believed his testimony to be true. (*Id.* at 26, 50.)

c. *Bendet*

Plaintiffs mount a similar attack on the testimony and information provided by Bendet. According to plaintiffs, "[u]sing Bendet's fear and insecurity, . . . Savage bull[ied] and coerce[d] Bendet into admitting that he committed a crime to avoid a false prosecution." (Pl. Br. #241 at 33.) In support of this assertion, plaintiffs cite portions of conversations wherein Savage told Bendet, "You have a lot to lose by screwing me,"[46] and "If you don't testify against Lawson, then maybe Lawson has something on you, and he will testify against you." (*Id.* at 34.) Plaintiffs further complain that "Savage convinced Bendet into the false belief that others testified that he conspired with Lawson to blow up a union trailer . . . when, in fact, she did not [have such information.]" (*Id.*)

Plaintiffs' claim of coercion is factually and legally flawed. First, the alleged "intimidation" does not appear to have been of such force as to overcome the will of the witness: upon being recalled to testify again before the first

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46. Plaintiffs' reliance on this statement is frivolous. As discussed above with respect to the alleged threat made to Nachamkin, this comment related to Savage's attempt to prevent Bendet from revealing to Lawson *her* participation in the matter, not to any plea to testify falsely. (*See* Tape NYN 1586 [transcript at 23-30].)

grand jury, Bendet specifically denied that he felt intimidated by Savage or that she had ever asked him to testify falsely. (Grand Jury Testimony of Mayer Bendet[47] on 11/16/81 at 26-27.)[48] Second, Savage's statements characterizing Bendet's interests in testifying are insufficient to raise an issue of coercion. *See Dukes,* 879 F. Supp. 335, 342 (existence of "swearing contest" insufficient to defeat summary judgment in face of grand jury presumption of probable cause) (quoting *Collum*, 691 F. Supp. at 639)). Moreover, through Bendet's own testimony, the grand jury was made aware of Savage's allegedly coercive efforts towards Bendet (*see* Bendet GJ 11/16/81 at 26-27), and thus was able to give his testimony whatever weight it believed was deserved. *See Extradition of Atta*, 706 F. Supp. 1032, 1052 (E.D.N.Y. 1989) (even with evidence that testimony may have been the result of torture, "the constitution [does not mandate] that a jury must disregard a confession if it believes the confession was coerced."),

Plaintiffs additionally point to Bendet's deposition testimony wherein he alleges that Elbogen offered him $30,000 "to make sure [Lawson] goes down." (Pl. Br. #241 at 35.) Notwithstanding the seriousness of this accusation of bribery, there is simply no evidence before this Court

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47. Hereinafter cited as "Bendet GJ [date]."

48. Plaintiffs' brief implies that when he first went to the authorities, Bendet advised that there was no intention to "do anything with a trailer" and that the $5,000 payment was simply Lawson's repayment of a loan from Bendet. (Pl. Br. #241 at 23

(Cont'd)

that this offer, if actually made and with serious intent, had any effect on either Bendet's testimony or the grand juries' determinations of probable cause.

According to Bendet, this offer was made to him *after* his first session before the grand jury. (Transcript of 4/21/82 Conversation between Charles P. Beissel and Fred Kamman, plaintiffs' investigators, and Bendet ["Bendet Tape"] at 2, 9, attached as Ex. B to Union defendants' 3/5/97 Letter to the Court.) A detailed comparison of Bendet's four grand jury appearances reflects that virtually all of the substance of his testimony was revealed in the first session, including complete descriptions of the May 7, 1980 meeting and the subsequent actions taken regarding the $5,000 invoice. (*See, e.g.,* Bendet GJ 9/25/81 at 85-87.)

Moreover, in later describing the alleged offer from Elbogen, Bendet made clear not only that he rejected the offer, but also that he neither took any action in response to the offer nor heard any further mention of such a deal. (Deposition of Mayer Bendet[49] on 6/10/92 at 125-29.) In fact, Bendet did not regard the offer as a serious one.

(Cont'd)

(citing Pl. Ex. 16).) In fact, the exhibit cited, an OSP memorandum of a meeting with Bendet on May 18, 1981, reveals that from the outset, Bendet told the authorities that in the presence of others, Lawson gave him $5,000 to bomb the Union trailer, and that although *Bendet* never intended to bomb the trailer, he agreed to do so, as he wanted to collect the money that Lawson owed him. (Pl. Ex. 16.)

49. Hereinafter cited as "Bendet Dep. [date]."

(*See* Bendet Tape at 4-5.) More importantly, although Elbogen allegedly requested that Bendet "[m]ake [his testimony] even stronger" about "[Lawson] specifically want[ing] the trailer blown up" (Bendet Tape at 9; Bendet Dep. 6/10/92 at 127), Bendet thereafter testified before the grand juries that he personally did not believe Lawson to have been serious about bombing the trailer. (Bendet GJ 11/16/81 at 58; Bendet GJ 1/28/82 at 84-86, 101; Bendet GJ 4/21/83 at 70-71.) Thus, the record is barren of any evidence that the alleged offer had any impact on Bendet's testimony. *See Kalika v. Stern*, 911 F. Supp. 594, 602 (E.D.N.Y. 1995) (probable cause not overcome where plaintiff had "not supplemented the record with any evidence indicating that [the witness] perjured himself"); *Walker v. New York City Police Dept.*, No. 94 Civ. 3608, 1996 WL 391564 at *4 (E.D.N.Y. 1996) (same); *Rose v. Bartle*, 692 F. Supp. at 531 (fact that witness was asked to commit perjury insufficient to overcome probable cause where no actual perjury shown).

Finally, Bendet specifically testified that his motive in testifying truthfully against Lawson was to cooperate with the government in order to avoid future prosecution (Bendet GJ 11/16/81 at 26; *see also* Tape NYN 1586 [transcript at 32]); as noted above, even proven allegations of coercion are insufficient to undermine the reliability of a witness' testimony where that testimony resulted from a legitimate motive apart from the coercion. *See Mitchell*, 966 F.2d at 100 ("Inculpatory statements are not involuntary when they result from a desire to cooperate . . . ."); *see also Scully*, 850 F.2d at 904. Moreover, Bendet's implication of Lawson in the bombing plot was confirmed by other evidence

presented to the grand juries, which independently provided probable cause of Lawson's involvement.[50] Hence, after considering a wide array of evidence, both grand juries returned indictments despite Bendet's equivocation regarding Lawson's intent.

In conclusion, plaintiffs' allegations of coercion on the part of defendants, and bribery on the part of Elbogen,[51] are insufficient to overcome the strong presumption of probable cause created by the two grand jury indictments of Lawson. Even if such claims were substantiated — and this Court

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50. *See* p. 46 & n.43, *supra*. As to the Medicaid-related charges, probable cause was established almost entirely through independent evidence, such as Lawson's tape-recorded statements to Bendet, the testimony of the State's investigative accountant, Lombardo, and documentary evidence.

51. At his deposition in June 1992, Bendet for the first and only time suggested that the $30,000 offered by Elbogen was to be funded by the Union. (Bendet Dep. 6/10/92 at 125.) At his continued deposition in October 1992, Bendet substantially qualified his earlier deposition testimony, explaining that while Savage and Elbogen were "working together" in 1981, "I just don't remember clearly that I was offered money from Diane [Savage]," and "I don't even remember clearly at this moment . . . that I was offered money from Elbog[e]n, too much time has passed. I do remember that money was offered, I think it was from Elbog[e]n." (Bendet Dep. 10/14/92 at 236.) One decade earlier, in April 1982, when interviewed and tape-recorded by Lawson's investigators, Bendet had advised that the $30,000 offer came from Elbogen, who hoped to "tak[e] over the home after [Lawson] gets thrown out of it" (Bendet Tape at 3), and that Savage offered him "nothing at all, because she had nothing to offer." (*Id.* at 9.)

finds that they are not — the circumstances in this case would not permit a reasonable trier of fact to question the findings of probable cause. *See Dukes*, 879 F. Supp. at 342-43 (even accepting accused's exculpatory evidence as true, probable cause not overcome on summary judgment); *Scheiner v. Wallace,* No. 93 Civ. 0062 (RWS), 1996 WL 633418 at *8 (S.D.N.Y. Oct. 31, 1996) (even where individual allegations may create issues of material fact, cumulative effect held insufficient to overcome presumption). Consequently, defendants are entitled to summary judgment dismissing plaintiffs' claims of malicious prosecution, false arrest, and false imprisonment under section 1983.

G. *Due Process Allegations*

Plaintiffs' section 1983 cause of action contains two sets of due process claims apart from the allegations already discussed: deprivation of property and deprivation of the right to fair judicial proceedings.

1. *Deprivation of Property*

First, plaintiffs claim that defendants interfered with their "rights to continue operation of the Lawson Institute under their interim receivership agreement, and to apply for a permanent license thereto; . . . and [their] participation in the Medicaid program . . . ." (Comp. at ¶ 128.) To survive a motion for summary judgment on a claim for deprivation of property, plaintiffs must, at a minimum, demonstrate that they had a legitimate claim of entitlement to the property

benefit at issue.[52] *See R.R.I. v. Southampton*, 870 F.2d 911, 915 (2d Cir.), *cert. denied*, 493 U.S. 893 (1989) (citing *Board of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 2709 (1972); *Perry v. Sinderman*, 408 U.S. 593, 601, 92 S.Ct. 2694, 2699 (1972)). Contrary to plaintiffs' arguments (*see* Pl. Br. #242 at 61-63), the entitlement analysis turns on the degree of discretion possessed by the agency in question, and not on the likelihood that the agency would grant the relief or benefit sought. *R.R.I. Realty*, 870 F.2d at 918 (citing *Walentas v. Lipper*, 862 F.2d 414, 419 (2d Cir. 1988), *cert. denied*, 490 U.S. 1021 (1989); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201-02 (2d Cir. 1987); *Sullivan v. Town of Salem*, 805 F.2d 81, 85 (2d Cir. 1986)).

In this case, the receivership agreement granted discretion to DOH to terminate the receivership in the event DOH obtained new information reflecting on the receiver's character. (State Ex. 5 at ¶ 1.03.) Moreover, DOH retained discretion not to extend the agreement at the expiration of the stated term (State Ex. 69 at pp. 62-64), which, after several extensions, was due to expire on June 1, 1981. (State Ex. 70 at p. 1) Given these elements of discretion, and thus lack of certainty as to whether the Lawson Institute would otherwise have continued in its position as receiver,

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52. As previously discussed, *see* pp. 12-13 & n.12, *supra*, plaintiffs' standing to assert these allegations is far from clear, as it was Lawson-Burich — not plaintiffs individually — that entered into the receivership agreement with DOH (State Ex. 5) and that applied to PHC to own and operate the Home. (*See* State Ex. 44 at p. 2.) Moreover, Lawson was no longer a shareholder at the relevant times. (*See id.*; State Ex. 58.)

plaintiffs can claim no legally cognizable entitlement to the continuation of that status.

Likewise, in considering an application for permanent establishment, PHC was permitted to consider factors such as the applicant's competency and character, as well as "other matters" deemed pertinent. N.Y. Pub. Health Law § 2801-a(3). In light of this broad grant of discretion to PHC, plaintiffs possessed no entitlement to permanent establishment or ownership of the Home. *See R.R.I. Realty*, 870 F.2d at 919; *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985).

Finally, even if plaintiffs could prove any entitlement to their continued operation of the Home, they cite no proof that any acts of the State or Union defendants were the legal cause of any interference with those alleged rights. *See* p. 31-33, *supra*. Accordingly, defendants are entitled to summary judgment dismissing plaintiffs' allegations of deprivation of property.

2. *Deprivation of Fair Judicial Proceedings*

The first cause of action also alleges interference with plaintiffs'

> rights of access to the courts, and quasi-judicial administrative agencies in the State of New York, including but not limited to the State Public Health Council; rights to impartial tribunals, including the State courts, the U.S. Bankruptcy Court, and the Public Health Council; . . . [and]

> rights to a fair trial and judicial proceedings, including those criminal charges brought against plaintiff Lawson in the State Supreme Court, Kings County, the order to show cause receivership proceedings brought in the same court, and the licensure proceedings before the State Public Health Council . . . .

(Comp. at ¶ 128.) However, plaintiffs do not support these allegations with evidence of acts of interference by the State or Union defendants.

Regarding PHC, as noted earlier, the failure to issue the Lawson Institute a permanent operating certificate resulted from plaintiffs' not having provided the requested information on remand. With respect to the order to show cause, the DOH defendants have been dismissed from this case, and none of the remaining defendants was involved in any way with the issuance of the order. And finally, a claim of deprivation of a fair criminal trial cannot lie where the accused has been acquitted on all charges, as Lawson was in his criminal case. *See Schiavone Constr. Co.*, 678 F. Supp. at 66 (citing *United States v. Ferguson*, 758 F.2d 843, 853 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *Kips v. Ewell*, 391 F. Supp. 1285, 1290 (W.D. Va. 1975), *aff'd*, 538 F.2d 564 (4th Cir. 1976)).[53]

Given the absence of issues of fact as well as the legal insufficiency of these due process claims, both the State

53. Plaintiffs do not address — let alone proffer supporting proof — of their claim with respect to the federal bankruptcy proceedings.

and Union defendants' motions for summary judgment on these allegations should be granted.

III. *State Law Tort Claims*

A. *Supplemental Jurisdiction*

If the District Court agrees that plaintiffs' section 1983 cause of action should be dismissed in its entirety, the only allegations remaining would be state law tort claims, consisting of malicious prosecution, abuse of process, interference with both prospective advantage and with contract, and defamation. However, as the federal cause of action is the only one over which the District Court has original jurisdiction, the Court should decline to exercise supplemental jurisdiction over the remaining state claims. *See* 28 U.S.C. § 1367(c)(3); *Maric v. St. Agnes Hosp. Corp.*, 65 F.3d 310, 314 (2d Cir. 1995), *cert. denied*, __ U.S. __, 116 S.Ct. 917 (1996) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726, 86 S.Ct. 1130, 1139 (1966)). Plaintiffs will not be without a forum in which to pursue their state law claims, as they may refile in state court within 30 days of dismissal from federal court, 28 U.S.C. § 1367(d), and will be able to use in the state case the extensive discovery already taken in this one. *See, e.g.*, N.Y. C.P.L.R. § 3117(c) (allowing depositions taken in federal action involving same parties and subject matter to be used in subsequent state court proceeding).

Alternatively, for the reasons stated below, the District Court should grant both the State and Union defendants' motions for summary judgment with respect to the state law claims.

Appendix E

B. *Malicious Prosecution*

As the elements of malicious prosecution in New York State are the same as those underlying a claim of malicious prosecution under section 1983, *see* cases cited at pp. 38-39 & accompanying notes, *supra*, plaintiffs' state law claim fares no better than their federal allegations: the state defendants are entitled to absolute immunity, and furthermore, plaintiffs have failed to rebut the presumption of probable cause, an essential element of their malicious prosecution claim.

C. *Abuse of Process*

In their third cause of action, plaintiffs allege that defendants "did wrongfully, maliciously, and with intent to injure plaintiffs cause the issuance of process in the criminal action [and] in the action brought on order to show cause . . . and did cause such process to be issued without justification and for purposes not permitted by law." (Comp. at ¶¶ 137-38.) Plaintiffs thereby misconstrue the nature of an abuse of process claim.

Even assuming that defendants "caused such process to be instituted" in order to "cause [Lawson's] demise in the health care industry" (Pl. Br. #241 at 89), under New York law on abuse of process, "[i]t is not enough that the actor have an ulterior motive in using the process of the court." *Hauser v. Bartow*, 273 N.Y. 370, 374, 7 N.E.2d 268, 270, *rearg. denied*, 274 N.Y. 489, 8 N.E.2d 617 (1937).[54]

54. As noted in the Restatement:

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Indeed, even the most self-serving motives in *issuing* the process do not create such a claim, as "[t]he gist of the [abuse of process] action . . . lies in the improper use of process *after* it is issued." *Dean v. Kochendorfer*, 237 N.Y. 384, 390, 143 N.E. 229, 231 (1924) (emphasis added); *see, e.g., Leogrande v. Leogrande*, 799 F. Supp. 1354, 1362 (E.D.N.Y. 1992); *Jeff Isaac Rare Coins, Inc. v. Yaffe*, 792 F. Supp. 13, 17 (E.D.N.Y. 1992); *Board of Ed. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Ass'n, Inc.*, 38 N.Y.2d 397, 402, 380 N.Y.S.2d 635, 641 (1975).

The relevant portions of the pleading in this case complain only of the *institution* of the state criminal and civil proceedings, and not of an abuse or "perversion" of any process after it issued. (Comp. at ¶¶ 137-38.) *See Restatement (Second) of Torts*, § 682, comment b.[55] Nor

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> [T]he entirely justified prosecution of another on a criminal charge, does not become abuse of process merely because the instigator dislikes the accused and enjoys doing him harm; nor does the instigation of justified bankruptcy proceedings become abuse of process merely because the instigator hopes to derive benefit from the closing down of the business competitor.

American Law Institute, *Restatement (Second) of Torts*, § 682, comment b.

55. According to the Restatement: "The usual case [of abuse of process] is one of some form of extortion, using the process to

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does any of the evidence before this Court reflect such conduct by defendants.[56] The mere fact that a party may have had to defend against an action, even at great expense, cannot serve as the basis for the tort. *See, e.g., Kalika v. Stern*, 911 F. Supp. at 602 (collecting cases); *Hetchkop v. Eve Concrete Corp.*, No. 92 Civ 4137 (LBS), 1993 WL 78073 at *2 (S.D.N.Y. Mar. 18, 1993). Moreover, the adverse result at the conclusion of the state civil action — the loss of the Lawson Institute's receivership status — does not give rise to such a claim. *See Dorak v. County of Nassau*,

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put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it." *Restatement (Second) of Torts*, § 682, comment b. For example, in *Farmingdale*, the defendant teachers' union went on strike for two days and was charged by plaintiffs with violating the Taylor Law (N.Y. Civ. Serv. L. § 210, subd. 1). Lawyers for the union then issued subpoenas *duces tecum* to 87 teachers to compel their attendance as witnesses at a hearing, thereby requiring the school to hire 77 substitutes to replace them. The court found the issuance of the subpoenas to be motivated not by a desire to have the witnesses in court but rather to harass and injure the school district. 38 N.Y.2d at 404, 380 N.Y.S.2d at 642-43.

56. Plaintiffs allege in their brief that the order to show cause in the state civil proceeding was "based on the outrageously false accusation of imminent danger to the health[,] safety and welfare of the patients of the home." (Pl. Dr. #241 at 90.) Whatever the validity of that assertion, this argument likewise fails to allege a specific abuse of any process occurring *after* the institution of the action. Moreover, the complaint alleges and the evidence shows that the order to show cause was sought and obtained by the DOH defendants (*see* Comp. at ¶¶ 104-14), who have been dismissed from this action.

329 F. Supp. 497, 501 (E.D.N.Y. 1970), *aff'd*, 445 F.2d 1023 (2d Cir. 1971) (plaintiff lost case because court ruled against him and not because of any pressure by prosecution). Finally, DOH's finding of unfitness, and Lawson's indictment by two grand juries, tend to support the propriety of the challenged court actions. *See Mager v. Seril*, 204 A.D.2d 205, 205, 612 N.Y.S.2d 30, 30 (1st Dept. 1994) (prior judicial finding of likelihood of success on merits rendered abuse of process claim "not viable").

Accordingly, defendants' motion for summary judgment should be granted dismissing plaintiffs' abuse of process claim.

D. *Intentional Interference with Contractual Relations*

In their fifth claim for relief, plaintiffs allege that "Defendants caused, maliciously and willfully, the breach of the interim receivership agreement, in which plaintiffs were ousted from the Lawson Institute on June 1, 1982." (Comp. at ¶ 143.) However, relevant caselaw dictates that an interference with contract claim cannot lie for the type of contract at issue here.

As discussed above, *see* p. 53, *supra*, the receivership agreement with PHC was for one year only and renewable only at the discretion of PHC. Under New York law, claims based on voidable and year-to-year contracts are treated as claims for interference with prospective advantage, *see Bernhard v. Dutchess Comm. College*, No. 80 Civ. 4871, 1982 WL 193 at *13 (S.D.N.Y. Feb. 19, 1982) (collecting

cases), as "any interference with [them] that induces [their] termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them." *Id.* (quoting *Restatement (Second) of Torts* § 768, comment i, *quoted in Guard-Life Corp. v. S. Parker Hardware Mfg. Co.*, 50 N.Y.2d 183, 193 n.4, 428 N.Y.S.2d 628, 633 n.4 (1980)).

Viewed another way, as plaintiffs' rights regarding the Home were not altered until after the expiration of the 360-day period under the receivership agreement and extensions thereof, the contract was in no way breached. For a claim of interference with an existing contract, "it is axiomatic that there must be a breach of that contract by the other party." *Inselman & Co., Inc. v. FNB Financial Co.*, 41 N.Y.2d 1078, 1080, 396 N.Y.S.2d 347, 349 (1977) (collecting cases); *see, e.g., Aniero Concrete Co. v. New York City Constr. Auth.*, No. 94 Civ. 9111, 1997 WL 3268 at *19 (S.D.N.Y. Jan. 3, 1997).

Accordingly, even if plaintiffs had adduced evidence of defendants' interference with the receivership decision, the fifth claim nevertheless fails as an independent cause of action.

E. *Interference with Prospective Advantage*

Plaintiffs' fourth claim for relief alleges that defendants "maliciously and intentionally interfered with" plaintiffs' expected receipt of the assets and property of the Home "upon the plaintiffs' securing a permanent operating certificate from [PHC and DOH]." (Comp. at ¶¶ 140-41.)

They contend that defendants "interfered with this business relationship for the sole purpose of harming Lawson [and] by means that were dishonest, unfair and improper." (Pl. Br. #242 at 74; Pl. Br. #241 at 91-92.)

Under New York law, a plaintiff alleging interference with prospective advantage must establish that the defendant "was motivated solely by malice or to inflict injury by unlawful means rather than self-interest or other economic considerations." *Entertainment Partners Group, Inc. v. Davis*, 198 A.D.2d 63, 64, 603 N.Y.S.2d 439, 440 (1st Dept. 1993), *quoted in Kramer v. Pollock-Krasner Foundation*, 890 F. Supp. 250, 258 (S.D.N.Y. 1995). Therefore, "where a defendant's interference is intended even partially to advance its own interests, the misconduct must rise to the level of fraudulent or criminal acts. *Kahn v. Salomon Bros. Inc.*, 813 F. Supp. 191, 195 (E.D.N.Y. 1993); *accord PPX Enterprises, Inc. v. Audiofidelity Enterprises, Inc.*, 818 F.2d 266, 270 (2d Cir. 1987). In the instant case, despite plaintiffs' mere gainsay that ruining Lawson was defendants' "sole purpose," numerous legitimate goals were served by defendants' actions in exposing Lawson's alleged misconduct. The State defendants had a clear interest in investigating alleged wrongdoing and prosecuting a perceived offender, while the Union defendants had this goal as well as those of improving Union members' employment status at the Home and protecting patients from what they believed to be corrupt management. (*See* Union Br. at 24-25; State Br. at 30.)

The question then becomes whether defendants' means were fraudulent or criminal. According to plaintiffs, the

conduct at issue consists of the institution of the criminal action and the administrative hearing before PHC. (Pl. Br. #241 at 75; Pl. Br. #242 at 92.) However, while plaintiffs correctly note that improper means may consist of "physical violence, fraud or misrepresentation, civil suits and criminal prosecutions," *see, e.g., Technology Consortium v. Digital Comm. Associates, Inc.*, 757 F. Supp. 197, 200 (E.D.N.Y. 1991), "[t]here can be no tortious action or impropriety when private citizens or public officials exercise their rights to notify the appropriate agencies or mobilize public opinion about a serious violation of the law." *Brownsville Golden Age-Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988).

In *Brownsville*, the Court of Appeals for the Third Circuit rejected a claim of interference with business relations where employees of a nursing home reported numerous violations to the Department of Health. Relying on First Amendment protections as well as the societal benefits of invoking government action, the court held that "[a]ction is not improper when the interference . . . fosters a social interest of greater public import . . . ." *Id.* at 159-60 (citing *Restatement (Second) of Torts* § 767, comment c (social interest in defendant's action is important factor in evaluating propriety of motive); F. Harper, F. James, and O. Gray, *The Law of Torts* § 6.12 at 349 (2d ed. 1986)).[57]

57. While this Court's research has uncovered no factually analogous New York case, the New York courts are likely to apply the same rationale as the Third Circuit, as New York courts have also adopted the approach set forth in the Restatement. *See Jews for Jesus, Inc. v. Jewish Comm. Rel. Council of New York, Inc.*, 968 F.2d 286, 292 (2d Cir. 1992); *Guard-Life*, 50 N.Y.2d at 189-90, 428 N.Y.S.2d at 631-32.

Defendants' actions in this case likewise cannot be viewed as improper; probable cause existed in the criminal prosecution, and the order to show cause issued by the state court judge raised serious questions about the fitness of the Home's proprietor. *Cf. Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 113 S.Ct. 1920 (1993) (in antitrust context, if party's participation in litigation is objectively reasonable, its subjective intent is irrelevant); *Village Supermarket, Inc. v. Mayfair Supermarkets, Inc.*, 269 N.J. Super. 224, 230, 634 A.2d 1391, 1383 (1993) (applying *Professional Real Estate* to tortious interference claims).[58]

A final consideration in determining the propriety of the alleged interference is "the proximity or remoteness of the actor's conduct to the interference . . . ." *Restatement* § 767; *see also Jews for Jesus, Inc. v. Jewish Comm. Rel. Council of New York, Inc.*, 968 F.2d 286, 292-93 (2d Cir. 1992) (citing *Guard-Life*, 50 N.Y.2d at 190 n.2, 428 N.Y.S.2d at 632 n.2)). Thus, a plaintiff must demonstrate that "but for the alleged interference, [the other party] would have entered into a contract with him." *Purgess v. Sharrock*, 806 F. Supp. 1102, 1111 (S.D.N.Y. 1992) (citing *Gertler v.*

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58. Courts have observed that conduct that is not sufficiently "improper" for purposes of interference with prospective advantage may nevertheless form the basis for a claim of defamation or injury to reputation. However, plaintiffs "cannot circumvent New York's one year statute of limitations for defamation by labeling a claim one for intentional interference with economic relations . . . ." *Riddell Sports Inc. v. Brooks*, 872 F. Supp. 73, 75 (S.D.N.Y. 1995) (citations omitted); *accord Rosen v. Hyundai Group*, 829 F. Supp. 41, 49 (E.D.N.Y. 1993).

Goodgold, 107 A.D.2d 481, 489-90, 487 N.Y.S.2d 565, 572 (1st Dept.), *aff'd*, 66 N.Y.2d 946, 498 N.Y.S.2d 779 (1985)).

In the instant case, regardless of whatever steps the State or Union defendants took to bring Lawson's conduct to light, it was a non-defendant — PHC — that chose to deny the Lawson Institute's establishment application, prompting the Institute to initiate administrative proceedings. Further, as already discussed, *see* p. 53, *supra*, PHC retained complete discretion to deny plaintiffs the operating license, and initially chose to do so only after investigation. (*See* Sweeney Aff. at ¶¶ 10-12.) *See Merrill Lynch Futures, Inc. v. Miller*, 686 F. Supp. 1033, 1040 (S.D.N.Y. 1988) (causation too attenuated to defeat summary judgment where ultimate decision was made after investigation, even though defendant's communications may have led investigator to question plaintiff); *Restatement* § 767, comment h (indirect causation more conducive to finding of propriety). More importantly, it was plaintiffs' failure to submit further documentation to PHC on remand that ultimately resulted in the Lawson Institute's inability to obtain a permanent operating certificate. Thus, plaintiffs' allegations are of actions far too attenuated to satisfy the "high standard" of causation required to sustain a claim of interference with prospective advantage. *See, e.g., Purgess*, 806 F. Supp. at 1111.

Accordingly, this Court recommends that defendants' motion for summary judgment be granted with respect to plaintiffs' claim for intentional interference with prospective advantage.

Appendix E

F. *Defamation*

Plaintiffs concede, as they must, that their claim for defamation should be dismissed because it was not brought within the one-year statute of limitations prescribed for such causes of action. N.Y. C.P.L.R. § 215(3). (*See* 12/5/95 Tr. at 76.) Even assuming that plaintiffs had properly alleged specific instances of defamation, the statements arguably at issue would have been published by June 1, 1982, at the latest, when the Lawson Institute's receivership was revoked. (*See id.*)[59] This action was not commenced until October 31, 1984, more than one year after the latest possible publication of defamatory statements.

CONCLUSION

For the foregoing reasons, it is the recommendation of this Court that defendants be granted summary judgment, dismissing plaintiffs' complaint in its entirety; or, in the alternative, that the District Court grant summary judgment dismissing plaintiffs' first cause of action, and decline to exercise supplemental jurisdiction over plaintiffs' state law claims.

---

59. Although New York law requires that plaintiffs plead the specific words alleged to be defamatory, N.Y. C.P.L.R. § 3016(a); *Alanthus Corp. v. Travelers Ins. Co.*, 460 N.Y.S.2d 549, 551 (1st Dept. 1983), the pleading in this case contains no such allegations. At oral argument, plaintiffs' counsel explained that the statements at issue "appeared in the news articles" (12/5/95 Tr. at 76) — apparently the October 1981 article in the *Village Voice* (State Ex. 40; Pl. Ex. 9) and a newspaper article published during the administrative hearing, after Lawson's acquittal. (*See* 12/5/95 Tr. at 76.)

Appendix E

Any objections to the recommendations contained herein must be filed with the Honorable Carol B. Amon on or before *March 28, 1997.* Failure to file objections in a timely manner may waive a right to appeal the District Court order. *See* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(a), 6(e), 72; *Small v. Secretary of Health and Human Services*, 892 F.2d 15, 16 (2d Cir. 1989).

The Clerk is directed to mail a copy of this Report and Recommendation to all counsel appearing in this case.

Dated: Brooklyn, New York
March 12, 1997

s/ Roanne L. Mann
ROANNE L. MANN
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED MARCH 19, 1999

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
10 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 19th day of March one thousand nine hundred and ninety-nine.

Dkt No: 97-9352

Lawson

Plaintiff-Appellant

v

Abrams

Defendant-Appellee

A petition for rehearing and a petition for rehearing en banc having been filed herein by the appellant Bartholomew J. Lawson.

Appendix F

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

CAROLYN CLARK CAMPBELL,
Clerk

By: s/ Beth J. Meador
Beth J. Meador,
Administrative Attorney

Supreme Court, U.S.
FILED
JUL 21 1999
OFFICE OF THE CLERK

No. 98-2027

IN THE

Supreme Court of the United States

October Term, 1998

BARTHOLOMEW J. LAWSON and NANCY A. LESTER,

Petitioners,

-against-

ROBERT ABRAMS, former Attorney General of New York State, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STEVEN B. PRYSTOWSKY
Counsel of Record
LESTER SCHWAB KATZ & DWYER
Attorneys for Respondents Judith Berek, Leon Davis, Philip Witkower, Edward Kaye, Diane Savage, also Known as Diane Iandoli and Doris Turner
120 Broadway
New York, NY 10271
(212) 964-6611

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(7387 – 1999)

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QUESTION PRESENTED

Whether this Court should review a unanimous ruling of the United States Court of Appeals for the Second Circuit that it had no reason to question a statement of the district court judge, in upholding a Magistrate Judge's report and recommendation, that it complied with 28 U.S.C. § 636(b)(1), having "read and reviewed the record in this matter de novo."

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STATEMENT OF THE CASE

A. Factual and Procedural Background

The Parties

Plaintiff Bartholomew J. Lawson was a principal in the Lawson Life Extension Institute, which became the receiver of the Haym Salomon Nursing Home ("Home") in March 1980 (A170).[1] Lawson was later indicted by a grand jury for conspiracy in the fourth degree, falsifying business records in the first degree, offering a false instrument for filing in the first degree and criminal solicitation in the fourth degree (A343). On February 25, 1983, Justice Aronin, in Supreme Court, Kings County, dismissed Count 1 and Count 6 of the indictment with leave to the special prosecutor to resubmit to the grand jury. The court upheld the other counts (A356-366).

On May 4, 1983, the prosecutor presented the entire case against plaintiff Lawson to a new grand jury which indicted him on the same six counts as were contained in the original indictment (A373). Plaintiff Lawson's motion to dismiss the indictment was denied by Justice Goldstein on July 27, 1983 (A383-394). On November 4, 1983, Mr. Lawson was found not guilty of all charges (A1154).

Plaintiff Nancy A. Lester was a principal in Lawson-Burich Associates. She was formerly married to plaintiff Bartholomew Lawson.

Defendant Robert Abrams served as Attorney General when plaintiff Lawson was indicted.

---

[1] Numbers in parentheses preceded by "A" refer to pages in the Joint Appendix.

Defendant Judith Berek served as Director of Legislative and Professional Programs for District (Local) 1199 of the National Union of Hospital and Health Care Employees (A158-159).

Defendant Stephen J. Calvaca was a prosecutor assigned to the Office of the Special Prosecutor ("OSP") and conducted an investigation into the alleged criminal activities of Bartholomew J. Lawson (A1185).

Defendant Leon Davis was president of District (Local) 1199 in the 1980's. Mr. Davis is now deceased (A143).

Defendant Philip Witkower was assistant to Leon Davis when he was president of District (Local) 1199 in 1980 (A155). He hired Diane Savage, formerly Diane Iandoli, as Director of Research (A155-157).

Defendant Edward L. Kay served as Vice President of District (Local) 1199 and asked Diane Savage to assist the Union in its investigation of the Woodhull Nursing Home with respect to violations of the National Labor Relations Act (A153-154).

Defendant Joseph Lombardo was a principal auditor investigator in OSP and Deputy Attorney for Medicaid Fraud Control in the 1980's (A475-477).

Defendant Diane Savage was employed as a Director of Research by the National Union of Hospital and Health Care Employees in the 1980's (A147). Her responsibilities included investigating Union busters and those employers resisting bargaining with unions and violating collective bargaining agreements (A147-152). After learning from sources associated with plaintiff Lawson that he had hired Mayer Bendet to blow up a Union trailer for $5,000, she brought this information to the

attention of the OSP and assisted the OSP in its investigation (A149).

Defendant James Scaringe in 1978 joined the Office of the Special Prosecutor and served as Deputy Attorney General for Medicaid Fraud (A464). He was present during three interviews with Mayer Bendet and was responsible for memorializing the substance of the interviews (A465).

Defendant Doris Turner was Executive Vice President of District (Local) 1199 during 1980-1982 (A160). In 1982, she succeeded Leon Davis as President (A160).

Defendant Barry Friedman served as Deputy Attorney General for Medicaid Fraud Control (A472).

Defendant Eugene Nachamkin was a consultant for the Haym Salomon Home (A138).

The Plot to Bomb Local 1199's Trailer

In March, 1980, plaintiffs Bartholomew J. Lawson and Nancy Lester and Joyce M. Burich became receivers of the Haym Salomon Home for the Aged through a corporation known as Lawson-Burich Associates (A170). Lawson-Burich entered into a separate agreement which provided that it would become the owner of the Home on certain terms and conditions, including the receipt by Lawson-Burich of a permanent operator's license (A185).

Shortly after Lawson-Burich assumed control of the Home it discharged most of the District 1199 employees, which were primarily blue collar health care workers. This dismissal precipitated a job action by the Union. The Union picketed the Home and set up headquarters in a trailer nearby.

On or about May 7, 1980, the Home's management, including Lawson, met to discuss the ongoing labor dispute. The discussion focused upon a plan to dispose of the Union trailer. Lawson summoned Mayer Bendet to the Home. It was agreed that Bendet would blow up the Union trailer in exchange for a fee of $5,000 (A220-221). A check for $5,000 was drawn on the Home's account and made payable to Bendet's printing company, "Type and Print" (A221). Bendet cashed the check the following day. Bendet never bombed the trailer; nor did he do anything else in return for the $5,000.

The next year the Union commenced an investigation into Lawson's anti-union activities. Lawson's former associates, Israel Fogel, Aaron Elbogen, and Eugene Nachamkin, advised members of the Union about the bombing plot. The Union brought this allegation, among others, to the attention of the OSP. The Union defendants assisted the OSP in their investigation of the allegations. On about four occasions, Diane Savage, at the request of the OSP, interviewed informants wearing a concealed listening device (A149).

The OSP advised the Union that it may not have jurisdiction unless the Home submitted $5,000 for Medicaid reimbursement. Although the Home had sent a request for an invoice to Bendet, Bendet ignored it. The OSP had Bendet come to its offices to call Lawson to determine whether Lawson wanted him to submit an invoice to the Home for reimbursement. In a recorded conversation, Lawson instructed Bendet to submit an invoice indicating that he had performed work as a community consultant (A467). Bendet prepared the invoice under the supervision of the OSP and delivered it to the Home.

The OSP obtained from Fogel a copy of a Medicaid cost report which had been already filed with the New York State Department of Health (A317, A469, A554). According to the OSP, this cost report contained a $5,000 request for reimburse-

ment in a strike expense category. The OSP determined that the $5,000 in the cost report was the same $5,000 check handed to Bendet on May 7, 1980. On that basis, the OSP decided to present the case to a grand jury and seek an indictment (A442).

Grand Jury Testimony Results in Plaintiff Bartholomew Lawson's Indictment

The grand jury indictment of Bart Lawson resulted not from any Union official testifying but from testimony of associates of Mr. Lawson. At the grand jury hearing, Mayer Bendet testified that Lawson told him to blow up the Union trailer:

> Q. What was the indication from Mr. Lawson as to what you would do for the $5,000?
>
> A. To get rid of the Union.
>
> Q. By what means?
>
> A. Mr. Lawson himself?
>
> Q. Yes.
>
> A. What was going through his mind?
>
> Q. No. What did he state to you?
>
> A. To blow up the trailer (A220-221).
>
> * * *
>
> Q. Did it ever come from [Lawson's] mouth at any point that you should, in fact, blow up the trailer for $5,000?

A. Yes, it came from his mouth (A222).

* * *

Q. What did he say you should do for the $5,000 after this entire discussion had terminated? What was his last words to you with respect to what service you should render for that $5,000?

A. Blowing up the trailer (A223).

* * *

Q. Did you, in fact, receive a check for $5,000 drawn on the account of the Lawson Life Extension Institute during the course of that meeting on May 7, 1980?

A. Yes, I did.

Q. Based on what was told to you by Mr. Lawson at that time, what did he suggest that you should do in return for this $5,000?

A. To blow up the truck.

* * *

Q. Did he ever call you up –

A. No.

Q. -- and suggest to you what he told you that night was, in fact, something other than what he intended?

A. No (A224-25).

* * *

Q. With respect to the trailer, in exchange for the $5,000 what did [Lawson] tell you?

A. "To blow it up."

* * *

Q. Did he ever tell you anything or have another person on his behalf tell you anything to, in effect, rescind his direction to you to blow up the trailer in exchange for $5,000?

A. He did not (A226-227).

Summary Judgment Motions Dismissing the Complaint

The Union defendants moved for summary judgment under Fed.R. Civ., P. 56(b), arguing that they did not act under color of law, did not institute a criminal proceeding against the plaintiff, and that there was probable cause to believe that plaintiff Lawson had committed a crime based on the grand jury testimony of Mayer Bendet, Israel Fogel and Haim Stern (A129-146).

The State defendants also moved for summary judgment (A433-934).

Plaintiffs' Opposition

Plaintiffs vigorously opposed the summary judgment motions, claiming that plaintiff Lawson's indictment was a result of a "conspiratorial agreement between Leon Davis, president of Union (Local) 1199 and Attorney General Robert Abrams to prosecute Lawson and wreck him in the health care industry" (A957).

Plaintiffs further contended that the Union defendants invented the story that Lawson had engaged in a plot to bomb the Union trailer and that discovery has revealed "there existed no plot to bomb the Union trailer" (A958). Moreover, plaintiffs argued that the Union defendants "did not have probable cause to believe that there was a plot to bomb the trailer" (A959).

Magistrate-Judge Mann's Report and Recommendation

In a 64-page report (A1293-1356), Magistrate-Judge Roanne L. Mann recommended that "defendants' motions be granted and judgment entered in favor of defendants, dismissing plaintiffs' complaint" (A1293). The exhaustive and comprehensive opinion included many recommendations:

> ¶ Plaintiff Lawson lacked standing of being deprived of his continued operation of the Lawson Institute because he relinquished his interest in the corporation before DOH's decision to terminate the receivership and PHC's initial decision to deny the establishment application (A1305);
>
> ¶ State defendants Abrams, Kuriansky, Berlowitz, Calvaca and Friedman are entitled to absolute immunity from the malicious prosecution claim and claims relating to the presentation to the grand jury (A1306-1309);

¶ The State defendants are entitled to qualified immunity with respect to plaintiffs' allegations of disclosure of grand jury information and illegal wiretaps (A1311);

¶ Plaintiffs' § 1983 claims against the State defendants and Union defendants other than Diane Savage for lack of personal involvement in any of the alleged violations should be dismissed (A1313-1318);

¶ Plaintiffs' § 1983 claims against the Union defendants including Diane Savage, for lack of proof that they acted under color of State law should be dismissed (A1318-1320);

¶ No genuine issue of fact is presented with respect to illegal tape recordings of plaintiff Lawson by any of the defendants other than Diane Savage (A1328);

¶ Plaintiffs have no malicious prosecution claim because the "two grand juries returned indictments charging Lawson with conspiracy to commit arson, falsifying business records, filing a false instrument and criminal solicitation" created a "presumption of probable causes to both the arson and the medicaid fraud" (A1330-1332);

¶ Plaintiff Lawson failed to overcome "the strong presumption of probable cause arising" from his indictments (A1335);

¶ Plaintiffs' allegations of coercion by the defendants and bribery on the part of Elbogen was insufficient to overcome the strong presumption of probable cause created by the two grand jury indictments of Lawson (A1335-1344);

¶ Defendants are entitled to summary judgment dismissing plaintiffs' allegations for deprivation of property under § 1983 because there was lack of certainty whether the Lawson Institute would have continued in its position as receiver and the grant of discretion to PHC (A1344-1345);

¶ Plaintiffs failed to support allegations of being deprived of the right to fair judicial proceedings as evidence of acts of interference by the State or Union defendants (A1346); and

¶ Declining to exercise supplemental jurisdiction over the remaining State claims including malicious prosecution, abuse of process, interference with prospective advantage and with contract and defamation (A1347).

Should the district court exercise supplemental jurisdiction, Magistrate-Judge Mann recommended the following:

¶ Dismissal of plaintiffs' malicious prosecution claims because the State defendants were entitled to absolute immunity and plaintiffs failed to rebut the presumption of probable cause (A1347-1348);

¶ Dismissal of plaintiffs' abuse of process claim for failing to demonstrate any abuse or perversion of any process after it was issued (A1348-1350);

¶ Dismissal of plaintiffs' claim for intentional interference with the contractual relations finding that the contract was "in no way breached" (A1350-1351); and

¶ Dismissal of plaintiffs' claim for interference with prospective advantage, finding that the Union had a clear

> interest in improving its members' employment and that plaintiffs' allegations are of actions far too attenuated to satisfy the "high standard" of causation required to sustain such a claim (A1351-1354).

Judge Amon's Memorandum and Order Granting Defendants' Motions to Dismiss Plaintiffs' Complaint

After plaintiffs filed their objections to Magistrate-Judge Mann's report and recommendations, Judge Amon undertook a *de novo* review. Judge Amon adopted the findings and recommendations in the report and granted defendants' motions for summary judgment in its entirety after

> having read the Report, plaintiffs' objections, defendants' responses, and plaintiffs' replies, and having read and reviewed the record in this matter *de novo* (A1407).

Judge Amon concurred with Magistrate-Judge Mann's conclusion concerning the malicious prosecution claim under § 1983 and dismissed it because the State defendants were protected by absolute immunity and plaintiffs failed to show personal involvement on the part of the Union defendants; and failed to establish lack of probable cause (A1409).

Judge Amon also stated another reason for the dismissal of the malicious prosecution claim. The court found that plaintiff Lawson failed to allege that he was deprived of his liberty, a *sine qua non* for a malicious prosecution action under § 1983 based upon the Second Circuit's ruling in Singer v. Fulton County Sheriff, 63 F.2d 110. The district court observed:

> Plaintiffs' claim also fails because they have not alleged how defendants' actions violated Law-

> son's Fourth Amendment right to be free from unreasonable search and seizure or provided an alternative basis for a malicious prosecution claim under § 1983. In any event, even if a Fourth Amendment violation could be divined from the numerous legal submissions in this case, or rectified by a repleading of the complaint, this claim fails for the additional reasons articulated in the report (A1409-1410).

In addition, the district court rejected Magistrate-Judge Mann's recommendation that it decline to exercise supplemental jurisdiction, ruling that "it is appropriate to exercise supplemental jurisdiction over State law claims" (A1410). Having exercised supplemental jurisdiction, the district court held that defendants were entitled to summary judgment on plaintiffs' State law claims for malicious prosecution, abuse of process, intentional interference with contractual relations, interference with prospective advantage and defamation (A1410).

The Court of Appeals' Affirmance

The Court of Appeals for the Second Circuit affirmed, in a Summary Order,[2] the order of the district court granting defendants summary judgment The court unanimously rejected plaintiffs' argument that the district court did not make a *de novo* determination:

> Judge Amon's opinion expressly states that the district court, "having read the Report, plaintiffs' objections, defendants' replies, and having read and reviewed the record in this matter de novo, adopts the findings and recommendations in the

---

[2] The Order is reproduced in Petition for Writ of Certiorari at 2a-6a.

> Report and grants defendants' motion for summary judgment in its entirety." We have no reason to question that all this was done, and we decline to impose the requirement that a district court parrot each finding and recommendation that it chooses to adopt (Petition at 4a).

The court also found that plaintiffs' § 1983 claim alleging malicious prosecution failed for inability to prove lack of probable cause and that defendants did not commit any unconstitutional violations or state law torts. The court also held that there was no claim for § 1983 violation for unreasonable search in the complaint.

Finally, the court concluded that the district court correctly decided the issues of conspiracy and lack of probable cause especially since the grand jury indictment created the presumption of probable cause that was not overcome by "evidence that the indictment was the product of fraud, perjury, the suppression of evidence, ... or other police conduct undertaken in bad faith (Petition at 5a-6a).

REASONS FOR DENYING THE PETITION

This case does not raise new issues concerning review by the district court of a magistrate judge's findings. The issues raised were settled by this Court long ago in United States v. Raddatz, 447 U.S. 667, 100 S.Ct. 2406, 65 L.Ed.2d 424, *reh'g denied*, 448 U.S. 916, 101 S.Ct. 36, 65 L.Ed.2d 1179 (1980).

To deal with *de novo* review, this Court has developed clear principles that have been faithfully adhered to. *De novo* review of a magistrate judge's recommended disposition simply means, according to *Wright, Miller & Marcus, Federal Practice and Procedure Civil 2d.*, §3070.2 (378-9):

> At a minimum, it is clear that the district judge is not required to approach the question raised on a dispositive motion in a totally fresh fashion without giving any weight to the views of the magistrate. At the same time, there can be no plausible argument that the district judge must accord any weight at all to the recommendations or findings of he magistrate judge. Whether or not a district court may sometimes be powerless to alter a magistrate judge's decision of a nondispositive matter, the discretion Article III requires with respect to dispositive matters permits the district judge to decide such an issue in any way he or she deems proper, and to reject, or pay no attention whatsoever to, the magistrate judge's findings.

To grant certiorari in this case would result in a restatement of settled law and would be of little benefit except to the parties to this suit. The scarce resources of this Court should not be devoted to matters of such limited utility.

Petitioners raise two issues in their petition: (a) what constitutes a proper *de novo* review of a magistrate judge's findings since there is a conflict among the circuits; and (b) whether the circuit court is required by statutory and constitutional principles to review the decision of the district court under the "independent" or "plenary" standard or the "clear error" standard.

Both issues are actually no issues: there is no conflict among the circuits concerning the meaning of "*de novo*" review and the circuit court correctly reviewed the decision of the district court.

A. The District Court Correctly Conducted a *De Novo* Review

To satisfy *de novo* review under 28 U.S.C. § 636(b)(1)(e) a district judge must review and consider the evidence presented to the magistrate judge. This is a "threshold requirement." (See, U.S. v. Remsing, 874 F.2d 614, 618 [9th Cir. 1989]). There is no requirement that the district court rehear witnesses. As the Court stated in Raddatz:

> To construe § 636(b)(1) to require the district court to conduct a second hearing whenever either party objected ... would largely frustrate the plain objective of Congress to alleviate the increasing congestion of litigation in the district court. We cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other (477 U.S. at 675-676, 100 S.Ct. at 2412).

In Raddatz, the district judge stated that he considered the transcript of the hearing before the magistrate, the parties' proposed findings of fact, conclusions of law and supporting memoranda, the written recommendations of the magistrate and the oral argument of counsel. This was an acceptable *de novo* review for the United States Supreme Court. Thus, where the district court judge stated that a review has occurred, as in Raddatz, that statement should suffice unless there "is affirmative evidence indicating that a *de novo* review was not performed" (Jones v. Pillow, 47 F.3d 251, 253 [8th Cir. 1995]). See, for example, Andrews v. Deland, 943 F.2d 1162, 1171 (10th Cir. 1991), *certiorari denied*, 502 U.S. 1110, 112 S.Ct. 1213, 117 L.Ed.2d 451 (1992) [the court will not look behind district court's expressed statement that it engaged in a *de novo* review of the record]; Murphy v. International Bus. Mach. Corp., 23 F.3d 719, *certiorari denied*, 513 U.S. 87, 115 S.Ct. 204, 130

L.Ed.2d 134 (1994) [brevity of the district court's order is an insufficient reason to justify reversal of the district court's order especially where the magistrate judge made a comprehensive recommendation]; U.S. v. Hamell, 931 F.2d 466, 468, *certiorari denied*, 503 U.S. 928, 112 S.Ct. 347, 116 L.Ed.2d 286 (1994) [order affirmed although district court failed to specify that he or she reviewed the record]; Hosna v. Groose, 80 F.3d 298 (8th Cir. 1996) [district court presumed to have made a *de novo* review unless affirmative evidence demonstrates otherwise].

Where there is affirmative evidence indicating that *de novo* was not performed, such as where the transcript had not yet been prepared, the Court of Appeals will find that the required review was not performed (Branch v. Martin, 886 F.2d 1043 [8th Cir. 1989]).

Petitioners cite a number of cases. None of them, however, demonstrate any conflict between the circuits. In Hill v. Duriron Co., Inc., 656 F.2d 1208 (6th Cir. 1981),[3] the district court ruled without sections of a 1,000-page transcript, which were "essential to rule on [plaintiff's] objections." It therefore did not receive "the judicial attention which Article III of the Constitution requires" (Id. at 1215). Similarly, in Hernandez v. Estelle, 711 F.2d 619 (5th Cir. 1983),[4] the magistrate's recommendation was based on conflicting testimony. The district court had to conduct a *de novo* review of the testimony itself to comply with § 636(b)(1)(B). Such a review, however, was not possible because the transcript of the hearing was not available. Accordingly, the Court of Appeals remanded the case back to the district court to conduct a *de novo* determination of those portions of the magistrate's report to which objection was made (Id. at 620).

---

[3] Petition at 13.

[4] Petition at 13.

In Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982),[5] the district court held that a *de novo* determination of the portion of plaintiff's objections were unnecessary because "the magistrate report is thorough and relevant to the issues presented." This was error because plaintiff specifically challenged the magistrate's proposed factual findings.

Finally, in Equal Employment Opportunity Commission v. Keco Industries, Inc., 748 F.2d 1097 (6th Cir. 1984),[6] the district court had reviewed the magistrate's findings under the "clearly erroneous" standard rather than according them a *de novo* review (Id. at 1099).

Absent any affirmative evidence that a *de novo* review was not performed by the district court, the court should not look behind a district court's express statement that it engaged in a *de novo* review of the record. The magistrate judge's report and recommendations were exhaustive and detailed. It covered every issue raised. Unless the district court was reversing the magistrate judge, there was no need for a lengthy opinion.

The district court here followed the cogent observation made by the Seventh Circuit in U.S. v. Rodriguez, 888 F.2d 519, 521 (7th Cir. 1989):

> When the district judge, after reviewing the record in the light of the objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it make sense to adopt the report, sparing everyone another round of paper.

Contrary to petitioners' contention, there are no conflict-

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[5] Petition at 13.

[6] Petition at 13.

ing positions between the circuit courts on *de novo* review. The district court judges in Hill v. Duriron Co., Inc., 656 F.2d 1208, 1215 (6th Cir. 1981), Hernandez v. Estelie, 711 F.2d 619, 620 (5th Cir. 1983), Orpiano v. Johnson, 687 F.2d 44 (4th Cir. 1982) and Branch v. Martin, 886 F.2d 1043 (1989), could not have reviewed the record *de novo* because the transcripts had not been submitted to them.

B. There Are No Conflicts Between the Circuits Concerning the Standard of Review of a District Court's Review of a Federal Magistrate Judge's Report.

The standard of review by the circuit courts are not in conflict concerning the standard applied to reviewing a district court's review of a magistrate judge's report. The circuit courts of appeal generally review applications of law to the facts *de nova* and findings of facts for clear error. See Stanley v. Herjirika, 134 F.3d 629 (4th Cir. 1998). This is the prevailing standard of review; Cumbie v. Singletary, 991 F.2d 715, 719, *certiorari denied*, 510 U.S. 1031, 114 S.Ct. 650, 126 L.Ed.2d 608 (1993), [the standard of review for factual findings is clear error and *de nova* review for conclusions of law]; Grimsley v. Mackay, 93 F.3d 676, 679 (10th Cir. 1996) [court applies clearly erroneous standard to the magistrate judge's findings of fact and reviews de novo questions of law and mixed questions of law and fact]; Tamez v. City of San Marcos, Texas, 118 F.3d 1085, 1091 (5th Cir. 1997) [*de novo* review of magistrate judge's legal conclusions].

Although the Second Circuit Court of Appeals did not set forth the standard of review it applied, Petitioners cannot seriously argue that the circuit court did not conduct an "independent" or "plenary" review. The court set forth plaintiff's arguments and the reasons why it rejected them. The court's opinion demonstrates that it applied the correct standard of

review. As noted by the Seventh Circuit Court of Appeals in U.S. v. Rodriguez, 888 F.2d 519, 521:

> Rodriguez treats adoption of the magistrate's report as a sign that he has not received his due. Yet, we see no reason to infer abdication from adoption. On occasion this court affirms a judgment on the basis of a district court's opinion affirming by adoption does not imply we have neglected our duties; it means, rather, that after independent review we came to the same conclusions as the district judge for the reasons that judge gave, rendering further explanation otiose. When the district judge, after reviewing the record in light of the objections to the report, reaches the magistrate's conclusions for the magistrate's reasons, it makes sense to adopt the report sparing everyone another round of paper.

Petitioners' second reason does not merit granting certiorari by this Court.

D. The Decision of the Court of Appeals was Not Erroneous.

In a desperate attempt to seek review, petitioners argue that the Court of Appeals' decision is erroneous. This argument is not a "compelling" reason for granting a Petition for Writ of Certiorari under Rule 10 of this Court's rules:

> A petition for a writ of certiorari is rarely granted when the asserted error consist of erroneous factual findings or the misapplications of a properly stated rule of law.

In addition, the magistrate judge correctly resolved factual questions.

Petitioners argue that the magistrate judge and the district court erred by finding that there was uncontradicted evidence that Israel Fogel illegally obtained the document from an official of the nursing home, Joyce Burich (A939). Petitioners criticize this finding, claiming that the magistrate judge overlooked the deposition testimony by Fogel where he stated: "This is the cost report that I got from Joyce's desk," which petitioners interpret as proof that he stole the papers. Petitioners also cite Justice Bernstein's finding that "Fogel did remove papers from the office of the Nursing Home Association" but fail to include the next sentence which is critical:

> These papers had already been filed with the Department of Health and would have been available to the Special Prosecutor in any event (A400).[7]

The circuit court was also correct that plaintiffs did not plead a cause of action for unreasonable search (5a). Paragraph 78 of petitioners' complaint is 34 lines and is a detailed recitation of what they claim occurred. However, petitioners' first claim for relief under 42 U.S.C. § 1983 alleges violations for false imprisonment; arrest; malicious prosecution; fair trial and judicial proceedings. There is no specific claim for a violation of unreasonable search (A78-79).

Finally, the Summary Order is not in conflict with this Court's decision in Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). The district court correctly concluded that plaintiffs' "evidence" of the claimed conspiracy between the State and the Union defendants was insufficient because it was based on conclusory allegations,

---

[7] Fogel gave Savage the cost report on July 21, 1981 (A469). But this report had already been filed almost a week earlier (A469, A554, A400)).

conjections, and speculations. In Adickes there was circumstantial evidence presented favorable to plaintiffs. Petitioners here do not cite any circumstantial evidence in the record supporting a jury verdict in their favor on the conspiracy issue. Petitioners' argument confuses the circumstantial evidence present in Adickes with the pure unfounded corclusory assertions and speculation presented here. Although the court must resolve any factual issues raised in a summary judgment motion in favor of the non-moving party, such resolution is required "only in the sense that, where the facts specifically averred by the non-moving party contradict facts specially averred by the movant, the motion must be denied" (Lujan v. National Wildlife Federation, 497 U.S. 871, 888, 110 S.Ct. 3117, 111 L.Ed.2d 695 [1990]) (emphasis supplied). Conclusory allegations in affidavits or other evidence submitted in opposition to a summary judgment motion are insufficient to raise a factual dispute. The object of Rule 56(e) "is not to replace conclusory allegations of the complaint or answer with conclusory allegations in affidavit." Id.

Finally, petitioners argue that theissue of probable cause was for the jury because there was conflicting evidence (Petition at 23-24, citing Rounseville v. Zahl, 13 F.3d 625 [2nd Cir. 1994]). However, in Rounseville, there was no indictment giving rise to a presumption of probablecause. See 13 F.3d at 627. Furthermore, the conflicting testinony in that case went not to probable cause, but to whether the underlying criminal prosecution had terminated in plaintiffs' favor, a prerequisite to a malicious prosecution claim separate from the probable cause prerequisite. That issue was not involvel in this appeal.

CONCLUSION

The issues raised in the petition have been previously settled by this Court. There is no conflict among the circuits concerning these principles and the Court of Appeals in this case properly applied them. Accordingly, there is no basis upon which this Court should grant certiorari. This Court should deny petition.

Respectfully Submitted,

STEVEN B. PRYSTOWSKY
Counsel of Record
LESTER SCHWAB KATZ & DWYER
Attorneys for Respondents
Judith Berek, Leon Davis, Philip Witkower
Edward Kaye, Diane Savage, also known
as Diane Iandoli, and Doris Turner
120 Broadway
New York, New York 10271
(212) 964-6611

Supreme Court, U.S.
FILED
AUG 2 1999
OFFICE OF THE CLERK

(3)

No. 98-2027

IN THE

Supreme Court of the United States

BARTHOLOMEW J. LAWSON
and NANCY A. LESTER,

Petitioners,

v.

ROBERT ABRAMS, individually and as
New York State Attorney General, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

THOMAS JOSEPH CONE
Attorney for Petitioners
350 Fifth Avenue
Suite 5119
New York, New York 10118
(212) 643-2828

Dated: August 2, 1999

154241

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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Petitioners herein reply to the Union Respondents' Brief in Opposition to Petition for Certiorari. The State Respondents and Respondent Nachamkin elected not to reply to our petition.[1]

I. MAYER BENDET'S CONTRADICTORY TESTIMONY BEFORE GRAND JURY

The Union Respondents quoted passages of Mayer Bendet's undated testimony before the grand jury that Petitioner Lawson paid him $5000 on May 7, 1980, to blow up a Union trailer as a means of getting "rid of the Union." (Union Reply 5-7). The recitation, however, failed to disclose the qualifying testimony which Bendet gave to the same grand jury on January 28, 1982, which, in part, concerned an affidavit signed by Bendet and read by State Respondent Calvacca to the grand jury. In it Bendet stated: "Bart Lawson never hired me to bomb a trailer in return for payment of $5000. . . . Bart Lawson nor myself never took any such joking seriously." (C.A. Jt. App. A- 823). After the affidavit was read, Bendet testified as follows:

> Q. Was he joking that night, was he laughing, hysterical, was he kidding, . . . when he said this?
>
> A. No. he's too smart for that. . . . Understand one thing; Lawson will tell twenty people in

---

1. We will refer to the appendix annexed to the Petition as "App." and to the Joint Appendix filed with the court of appeals as "C.A. Jt. App." each followed by the applicable page number(s). Our Petition for Certiorari will be referred to as "Petition" and the Union Respondents' Brief in Opposition to Petition for Writ of Certiorari as "Union Reply," each followed by the applicable page number(s).

> the room when it's night outside that it's day right now, and expect everybody to believe him. And he would tell me, "Go blow up the trailer" to impress somebody else. And I walk out of the room actually believing that he wasn't serious.
>
> * * *
>
> Q. In other words, to impress people; is that your testimony?
>
> A. That's Bart Lawson. Now the question was: Was he serious or not serious. In my opinion, he was not. (C.A. Jt. App. A-839).

II. REASONS FOR GRANTING PETITION FOR CERTIORARI

A. Conflict among the Circuit Courts of Appeals on Meaning of De Novo Review

The Union Respondents argue that:

> The issues raised were settled by this Court long ago in *United States v. Raddatz*, . . . [T]here is no conflict among the circuits concerning the meaning of "de novo" review. . . .[2]

(Union Reply 13-14).

---

2. The Union Respondents, in error, cited the applicable "de novo" statute as the nonexistent 28 U.S.C. § 636(b)(1)(e); the correct citation is 28 U.S.C. § 636(b)(1)(C).

The Union Respondents do not explain why they reject the view of Judge Easterbrook of the Seventh Circuit in *United States v. Rodriguez*, 888 F.2d 519, 521-22 (7th Cir. 1989) who noted a dispute between his Seventh Circuit and the Fifth and Eleventh Circuits. (Petition 9). In our petition we set forth cases showing that the dispute is even broader than described in *Rodriguez*. (Petition 10-14).

In our petition we cited three decisions which took an extremely deferential position on de novo review, i.e. *Andrews v. Deland*, 943 F.2d 1162, 1168-71 (10th Cir. 1991); *Clark v. Poulton*, 963 F.2d 1361, 1368 (10th Cir. 1992); and the circuit court decision in the instant case. (Petition 10-13; App. 1a-6a at 4a). The latter two cases are similar to the holding in *Andrews* which stated "We will not look behind a district court's express statement that it engaged in a de novo review of the record." *Andrews v. Deland*, 943 F.2d at 1171. These three cases seem to imply that the use of statutory words is conclusive proof of a de novo review. On the other hand, many other circuit courts have rejected a purported "de novo" review by a district court when certain objective circumstances are present. In our petition we cited numerous cases in the Fourth, Fifth, Sixth, Eighth and Tenth Circuits which have ruled that a failure of the district court to obtain and review a transcript or recording of testimony before the magistrate is an objective reason for finding that a de novo review was not afforded to the objecting party.[3] (Petition 13). Indeed, a decision in the Tenth Circuit prior to *Andrews* and *Clark* reached that conclusion. *Gee v. Estes*, 829 F.2d 1005, 1008-09 (10th Cir. 1987). A number of other circuit courts look to other objective standards which a district court

3. We noted in our petition that testimony before a magistrate is not generally available in a summary judgment case, which pertains in the instant case. (Petition 13, n.6).

must address in order to perform a de novo review. In our petition we cited cases in the Fourth, Sixth and Eleventh Circuits identifying such additional objective factors. (Petition 14).

Petitioners disagree that *Orpiana v. Johnson*, 687 F.2d 44 (4th Cir. 1982) supports the Union Respondents' position. (Union Reply 17; Petition 13, 14). While it is true that there was an absence of a transcript in that case, the holding also turned on the court's failure to rule "on those objections required [in] a de novo determination by the district court." 687 F.2d at 48. Cases such as *Hosna v. Groose*, 80 F.3d 298 (8th Cir. 1996) are not applicable because Petitioners have supplied affirmative evidence of errors made by the magistrate judge. (C.A. Jt. App. A-1293-1356; Petition 19-21). The Union Respondents failed to address *United States v. Shami*, 754 F.2d 670 (6th Cir. 1985) (per curiam) which held there was no de novo review because, *inter alia*, "the district court failed to review all of the defendant's objections." 751 F.2d at 672. (Petition 14).

The Union Respondents cited a decision in the Ninth Circuit to support its argument. It, however, stated a test in this regard in conflict with *Andrews* and *Clark*. *United States v. Remsing*, 874 F.2d 614, 616 (9th Cir. 1989). The court stated:

> The district court is in an 'appellate' role when reviewing the magistrate's findings and recommendations; its function is to correct those findings made by the magistrate when the litigant has identified a possible error.

This language is clearly in conflict with the Second Circuit's decision in the instant case. (Petition 12). Nothing was said about Judge Amon's failure to address and "correct those findings made by the magistrate when the litigant has identified a possible error." *Remsing*, 874 F.2d at 616.

B. Conflicts among the Circuit Courts of Appeals on the Standard of Review of a District Court's Review of a Magistrate Judge's Report

The Union Respondents argue that there is no conflict among the courts of appeals "concerning the standard applied to reviewing a district court's review of a magistrate judge's report." (Union Reply 18). Petitioners disagree and again the Union Respondents reject the view in *Rodriguez*, 888 F.2d at 521-22. (Petition 15-19). The Union Respondents support their position by citing *Stanley v. Hejirika*, 134 F.3d 629 (4th Cir. 1998); *Cumbie v. Singletary*, 991 F.2d 715, 719, *cert. denied*, 510 U.S. 1031, 114 S. Ct. 650, 126 L. Ed. 2d 608 (1993); *Grimsley v. MacKay*, 93 F.3d 676, 679 (10th Cir. 1996) and *Tamez v. City of San Marcos, Texas*, 118 F.3d 1085, 1091 (5th Cir. 1997). Neither *Stanley v. Hejirika* nor *Grimsley v. MacKay* are directly relevant because each involved a consensual submission by the parties of the case to a magistrate judge under 28 U.S.C. § 636(c)(1) not § 636(b)(1)(B). In *Cumbie v. Singletary*, the court cited *Lo Conte v. Dugger*, 847 F.2d 745 (11th Cir. 1988) as the basis for its expansive standard of review and we cited *Lo Conte* as representative of the decisions in the Third, Fifth, Sixth and Eleventh Circuit Courts of Appeals which are in conflict with those of the Second, Seventh, Eighth and Eleventh Circuit Courts of Appeals which favor a limited review. (Petition 15-19). *Tamez v. City of San Marcos, Texas* is another good example of an expansive review by a circuit court of mixed questions of law and fact. 118 F.3d at 1094, 1096.

III. THE EVENTS OF JULY 21, 1981

A. The Search of Petitioners' Premises

In our petition we argued that the Court of Appeals for the Second Circuit incorrectly claimed that we failed to plead an unreasonable search in respect to Fogel's removal of a cost report from Petitioners' business establishment on July 21, 1981. (App. 5a). We pointed out that the court of appeals overlooked the language in paragraph 78 of the complaint. (Petition 21). The Union Respondents accepted that there is language regarding this incident in the complaint but that the First Claim for Relief failed to expressly charge an unreasonable search. We argue that the language in the First Claim for Relief, in paragraph 128, is broadly enough stated, i.e. "rights to freedom from false imprisonment; arrest, and malicious prosecution" to encompass an illegal search and seizure which helped produce those results. The Rules of Federal Procedure state, "All pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f). In any event, however, the Union Respondents (and possibly the court of appeals) overlooked the Second Claim for Relief for Malicious Prosecution which states in paragraph 135, "The indictment against plaintiff Lawson was produced by fraud, perjury, the suppression of evidence, or other bad faith misconduct." (C.A. Jt. App. A-80). Petitioners argue that the events described in paragraph 78 would qualify as "bad faith misconduct."

B. Fogel's Deposition

The Union Respondents now appear to concede that Magistrate Mann failed to notice in the Record page 118 of Fogel's deposition where he contradicted his statement on

page 110. (Union Reply 20; Petition 20-21). The Union Respondents argue that Judge Amon's failure to respond to our Objections makes no difference because the purloined document had been filed with the Department of Health one week earlier. (Union Reply 20 n.7). They also cited Judge Bernstein, of the State Supreme Court, who stated that these papers "would have been available to the Special Prosecutor in any event." (Union Reply 20; C.A. Jt. App. A-400). The Union Respondents, however, did not include the prior ruling of Judge Aronin, of the State Supreme Court, which states, "It is well established that the exclusionary rule does not apply to grand jury proceedings. . . ." (C.A. Jt. App. A-365-66). In addition, Judge Bernstein failed to specify the statute or regulation under New York law which says that a document in the Department of Health would be available to the Office of Special Prosecutor absent lawful process or that Respondents Savage, Scaringe and Calvacca had any knowledge of the earlier filing. (C.A. Jt. App. A-400).

We informed Judge Amon of the magistrate judge's error on this point, but she failed to address it in the Memorandum and Order. (C.A. Jt. App. A1365-66; App.7a-12a). The fact that the magistrate judge could have made an argument similar to Judge Bernstein's, but did not, is irrelevant. Judge Amon failed to address the error to which we filed an objection. (App. 10a, n.1)

IV. THE UNION RESPONDENTS MISREPRESENT THE HOLDING IN *ROUNSEVILLE v. ZAHL*

A. The Effect of *Rounseville v. Zahl* on Indictment Cases

The Union Respondents try to distinguish the holding in *Rounseville v. Zahl*, 13 F.3d 625 (2d Cir. 1994), which is that disputed issues of fact concerning probable cause are jury questions, based on the fact that in *Rounseville* the criminal action was commenced by an "accusatory instrument" and not by an indictment as in the instant case. (Union Reply 21). They offered no case citation, however, to support this distinction. This is not the law in the Second Circuit; the Court of Appeals in *Marshall v. Sullivan*, 105 F.3d 47 (2d Cir. 1996), in a malicious prosecution case stemming from an indictment, reached the same conclusion on the point as in *Rounseville*. In *Marshall*, the court, in considering the issue of probable cause where there is a factual dispute, stated, "These remain disputed issues of fact which must be tried to a jury." 105 F.3d at 53.[4]

B. Probable Cause

The Union Respondents argue that "the conflicting testimony in . . . [*Rounseville v. Zahl*] went not to probable cause, but to whether the underlying criminal prosecution had terminated in plaintiffs' favor. . . ." (Union Reply 21). The Union Respondents misstated the holding in *Rounseville*.

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4. Even when there is an indictment, the presumption of probable cause "may be rebutted by proof that the defendant misrepresented, withheld or falsified evidence." *White v. Frank*, 855 F.2d 956, 961-62 (2d Cir. 1988); *Colon v City of New York*, 60 N.Y.2d 78, 82-83, 455 N.E.2d 1248, 1250, 468 N.Y.S.2d 453, 455-56 (1983).

In *Rounseville*, the court addressed the four elements of malicious prosecution under New York law. These are:

> (1) the initiation or continuation of a criminal proceeding against plaintiff, (2) termination of the proceeding in plaintiff's favor, (3) the lack of probable cause for commencing the proceeding, and (4) actual malice as the motivation for defendant's action.

13 F.3d at 628.

The court ruled that the second, third and fourth elements required a jury consideration. (13 F.3d 628-29; Petition 24).

V. SUMMARY JUDGMENT AND CONSPIRACY CASES

The Union Respondents argue that the instant case is not in conflict with this Court's decision in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 90 S. Ct. 1598, 1608 26 L. Ed. 2d 142 (1970). (Union Reply 20-21). We disagree. (Petition 22-23).

VI. CONCLUSION

We again request that the petition for a writ of certiorari be granted.

Dated: August 2, 1999

Respectfully submitted,

THOMAS JOSEPH CONE
Attorney for Petitioners
350 Fifth Avenue
Suite 5119
New York, New York 10118
(212) 643-2828